Supreme Court, U.S.
FILED
OCT 21 1991
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No. 91-665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH GELB,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

JOSEPH GELB,

Petitioner,

– against –

ROYAL GLOBE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Was Gelb denied his Constitutional Right to Due Process of law under Article V of the Constitution of the United States because there has not been "effective appellate review" to determine whether an arson occurred and whether Gelb committed the arson.

Was Gelb denied his Constitutional Right to Due Process of Law because the Second Circuit effectively dropped the arson issue from the case when it reversed the "explosive" counts but left standing the mail fraud counts.

Was Gelb denied his Constitutional Right to Due Process of Law when the Second Circuit failed to focus on a conviction which was predicated upon perjurious testimony of several key Government witnesses, falsification of documents, suppression of exculpatory evidence, creation of evidence, the inability to call witnesses because the trial judge would not issue subpoenas to break the walls of silence, upon Royal's investigation and lab analysis, (no public agency conducted any investigation), and upon Royals investigator's report (the only known investigation known to be of record), which Judge Mishler ruled as "privileged".

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Petitioner, JOSEPH GELB, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit refusing to provide effective Appellate review; thereby allowing a conviction, that is predicated upon perjurious testimony and obstruction of justice, to stand.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit in the criminal case is reported as *United States v. Gelb*, at 700 F.2d 875 (1983) and appears in Appendix A.

The Opinion of the Court of Appeals for the Second Circuit in the civil case is reported *Gelb v. Royal Globe Insurance* at 798 F.2d 38 (1987) and appears in Appendix B.

The Motions for Reconsideration and Reinstatment of Appeal appears in Appendix C.

The Motion for Rehearing En Banc appears in Appendix D.

JURISDICTION

The Court of Appeal's Opinion in this matter was filed on April, 1991. A timely Petition for Rehearing En Banc was filed on May 29, 1991. The Court of Appeal's, denial of the Petition for Rehearing was issued on July 24, 1991 and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix E.

STATEMENT OF THE CASE

Gelb, an Attorney (now suspended) owned and operated his CPA Firm, Law Practice, Franchise Company and Real Estate business, employing fifty people in a 5400 sq. foot commercial building in Woodmere, N.Y. which he leased. The rent was $2.50 a foot creating a leasehold (difference between the going rental and the rent paid) of about $500,000. Gelb extensively renovated the building and acquired office equipment including a telephone system, two xerox copiers, a collator and a computer. Approximately one month prior to the fire, Gelb's Insurance Agent, increased the coverage to cover the recently

completed leasehold improvements, and additional equipment. Gelb, living, only a few minutes from the building, spent much time at his offices. At about 5:15 P.M. on the day of the fire (April 26, 1980) Gelb stopped at the building to drop off some files and check the building. He was there for a couple of minutes, detected nothing and left the premises to return home. The building was destroyed by fire late afternoon/early evening April 26, 1980. Both the Hewlett and Woodmere fire departments fought the fire. The Nassau County Fire Marshal and two associates were at the scene the night of the fire for approximately twelve man hours and released the building for salvage at midnight. They did not retrieve any samples, did not rule out accidental causes, did not examine the electrical circuitry, did not ascertain the point of origin nor take any other steps set forth by any of the authorities, including the fire marshal's own lecture material (presented to the College of D.A.s) to support an arson prosecution. He interviewed Gelb at the scene and again when Gelb voluntarily submitted to a lie detector test ("no conclusive results"; two others tests were negative). No other Goverment Agency conducted any investigation of the fire. The night of the fire the County crane knocked the building down and since the fire marshal released the building, Gelb hired a crane that turned the building several times to retrieve his files. Royal's investigators, at the trial, presented two small wood samples retrieved twelve days after the fire from remains that were exposed to the elements and environment. Several days later, Royal's investigators delivered the samples in open coffee cans to Royal's lab. These samples were contaminated with gasoline.

About fifteen months later (as a result of a Grand Jury investigation that commenced just after Royal completed an Examination [of Gelb] Under Oath), Gelb was indicted and charged under count one of "maliciously damaging and destroying a business premises by means of an explosive," 18 U.S.C. 844(i)(1976); under count five of using an explosive to commit a felony, 18 U.S.C. 844(h)(1976); under counts two, three and four of using the mails to submit under oath a statement to the insurance company that Gelb had not caused the fire and counts six through ten of using the mails to defraud an insurance company 18 U.S.C. 1341, 1342 (1976).

At the trial the Government's witnesses were Royal's investigators, Royal's lab technician, the Hewlett fire Commissioner, and the Assistant Fire Chief of the Hewlett Fire Department. Fire Marshal Doran who testified at the Grand Jury and appeared at an EBT, appeared only as a rebuttal witness. The Assistant Chief, Hewlett Fire Department, testified falsely about opening the basement door, entering the basement and being prevented from fighting the source of the fire by a "blocked door" allegedly fifteen feet into the building. The Hewlett Fire Commissioner, presented a copy of a false report depicting the "blocked door". D.C. Judge Mishler denied Gelb's motions: to require the original diagram of the building; and to issue subpoenas to break the wall of silence created by the Hewlett and Woodmere Fire Departments, the Nassau County Police Department and the Fire Marshal's office. Judge Mishler also denied Gelb's motion to discover the Report of Royal's investigators, ruling it was a confidential communication within the client-attorney privilege, to be available at the civil trial. Gelb never saw Royal's report because Royal withdrew its counterclaim for approximately $100,000. Judge Mishler also denied Gelb's motion to require the Assistant U.S. Attorney to submit any reports which would prove that the samples had to have been contaminated after the fire. The government had the burden to prove that the building had been destroyed by use of an "explosive". The Government claimed that gasoline was used and called on several witnesses who without evidence inferred an arson had occurred. Irrespective of whether gasoline was or was not an "explosive" within 18 U.S.C. 844(i)(1976) or 18 U.S.C. 844(h)(19176) there was no direct evidence or proof beyond a reasonable doubt, that the building had been destroyed by any accelerant, let alone gasoline. In fact the Government [Royal's] witnesses testified that the fire had all the indicia of an accidential fire fueled by the balloon construction of an all-wood building containing vinyl and other synthetic furnishings. Gelb was convicted on all counts.

After Gelb's conviction, several firemen came forward because "they did not want an innocent man to go to jail". They testified that they believed that the fire started at about 4:30 P.M. Gelb was at a meeting some twenty minutes from the building. That meeting ended at 4:50. The fire was discovered at about 5:30

by a passerby, who heard the alarm and saw smoke coming from the roof. The firemen also testified that they did not smell gasoline (only the fire marshal testified that he smelled gasoline some five hours after the fire started), there were no fire conditions visible from the front of the building, that the fire department did not fight the fire from the basement, and the roof was not opened to allow the gases to escape thus forcing the walls to expand out. They testified that they opened the basement door, but could not enter because of the heavy fire conditions. Gelb retained two experts to recreate the fire scene and they testified at the 33 Hearing that Royal's samples (the only samples presented) could not have been exposed to heat or environment and that U.S. Bureau of Alcohol, Tobacco and Firearms had many tests that would support their theory. Judge Mishler, admitting that he did not understand the new evidence would not consider the new testimony and evidence that impeached the five Government [Royal's] witnesses.

On appeal to the 2d Circuit Oaks, Van Graafiland and Meskill (700 F.2d 875) determined that uncontained gasoline was not an explosive within the meaning of 18 U.S.C. § 844(j)(1976) and reversed counts 1 & 5 and left all of the mail fraud counts stand. Effective Appellate Review would have focused on the perjurious testimony and the *POSSIBILITY* that the jury would have come to a different conclusion. This Court denied Cert 464 U.S. 853 (1983) and Gelb went to prison for two years (subsequently reduced to one year by Judge Mishler on a "35 Motion").

In January, 1985 Royal moved, because of the conviction, to dismiss Gelb's claim for the proceeds of the insurance policy and for judgment on a counterclaim of approximately $100,000 for monies paid to the landlord on account of the fire. Judge Constantino granted summary judgment on both motions. In *Gelb v. Royal*, 798 F2d 38 (2d circuit, 1986), the Second Circuit affirmed the mail fraud counts relative to the inflated claim and reversed the decision of the District Court on the counterclaim, remanding the case for resolution of the question of arson. This finding was based on a review of the Court's earlier decision in Gelb's appeal from the criminal conviction wherein the Second Circuit expressly declined to review the sufficiency of the

evidence, including the newly discovered evidence directly related to Gelb's innocence "since it was unnecessary to do so in order to uphold the underlying mail fraud convictions."

The issue of Arson is an integral part of the Mail Fraud Counts. Absent the arson, the critical ingredient in a scheme to defraud, the Mail fraud counts (2, 3, & 4) should fall, an instruction given to the jury by Judge Mishler (D.C. Judge). The Panel also failed to consider the allegations of perjury and obstruction of justice, including the fabrication of evidence and creation and/or alteration of documents. The Panel in the Civil Appeal almost apologetically admitted error when the first panel failed to provide "effective appellate review". This Court denied Cert. (480 U.S. 948 [1987]).

On remand, Royal withdrew its counterclaim avoiding the resolution of the question of whether an arson occurred and whether Gelb committed the arson. Royal thus avoided exposing its files to judicial scrutiny, and deprived Gelb of the opportunity to present his witnesses and evidence which directly challenged the accuracy and integrity of Royal's evidence and witnesses.

Gelb was worth approximately four million dollars at the time of the fire, including the leasehold for his office building estimated at $500,000. He has satisfied all of his creditors and honorably and forthrightly atempted to rebuild his life notwithstanding serving a one year jail term, the loss of his license to practice law, and the reduction of his net worth to zero.

Since 1987 when this Court last denied Cert, Royal withdrew its counterclaim, acknowledging that it could not even by a preponderance of evidence prove that an arson occurred; the N.Y.S. Education Department is seeking the revocation of Gelb's CPA license because of the "crime" committed; and upon filing for readmission to pratice law after the required time lapse of seven years, Gelb was advised by the Grievance committee that it would fight the lifting of the suspension and seek disbarment, relying on the convictions and the failure of the Second Circuit to reverse the mail fraud counts. Additionally the panel that

heard *U.S. v. Gelb*, (Van Graafiland & Meskill) in May and July, 1991 restated the law in their decision in *U.S. v. Wallach, et al.*, (Nos. 181, 182, 183 - August Term 1990) and *U.S. v. John A. Mulheren, Jr.*, (No. 1557 August Term) that where perjury is alleged "the interest of justice" requires that the accused be given the benefit of the doubt and his Constitutional Right to Due Process of Law prevails over any one doctrine including "Collateral Estoppel".

Gelb, seeking his Constitutional Right "not to be deprived of ... property [right to his license] and his Constitutional Right to Due Process of Law filed a Motion for Reconsideration and Reinstatement of Appeal. The U.S. Attorney for the Eastern District did not respond, acknowledging the merits of Gelb's motion. The Appeal panel that heard *Gelb v. Royal* [Feinberg, Newman & Winter] ORDERED "Upon consideration of Gelb's motion of April 5, 1991, in this civil case, seeking reinstatement of his appeal and other relief, it is hereby ORDERED the motion is denied without prejudice to whatever relief, if any, Gelb may be entitled to in connection with his criminal case. The panel in the Criminal Appeal (Meskill, Van Graafiland and Oakes) denied the motion summarily. Gelb, timely, filed a Motion for a Hearing En Banc, which was summarily denied.

This matter has all of the appearances of enjoying all of the remedies of law and equity; when in actuality Gelb has never been able to confront all of the witnesses and evidence at one time in one forum. Gelb believes that his Constitutional right to Due Process of Law has been denied and is taking this final step to seek justice.

GELB WAS DENIED DUE PROCESS OF LAW BECAUSE THERE HAS NOT BEEN A FULL AND FAIR RESOLUTION OF THE QUESTION OF WHETHER AN ARSON OCCURRED AND WHETHER GELB COMMITTED THE ARSON

The denial of due process of law is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady*, 315 U.S. 791 (1941). Due Process of Law requires that there be an opportunity to present every available defense, that all witnesses be heard and all evidence be reviewed. *Lindsey v. Normit*, 404

U.S. 818 (1971). Due Process of Law demands that there be a full and fair trial even to the point of overlooking guilt to afford a Constitutional right. *Stone v. Powell*, 428 U.S. 465 (1975).

The Court looks to end litigation, but always seems to opt for a position encompassing the "ends of justice." Decisions consistently give the benefit of doubt to the accused, although not defining the steps the accused must take to accomplish the "ends of justice"; *Sanders v. United States*, 373 US 1 (1962). In *Kuhlman v. Wilson*, 477 US 106 (1986) the Court stated that there may be relitigation of claims previously decided when a defendant "supplements his constitutional claim with a colorable showing of factual innocence." Factual innocence in this case is indicated by the testimony of competent and qualified witnesses who only came forward after the conviction, notwithstanding diligent effort by Gelb's trial attorney to bring them forth during the trial. They testified: that no gasoline was present at the time of the fire; the two samples (retrieved, from the debris that had been turned several times and exposed to the elements, by Royal's investigators 12 days after the fire) were contaminated proximate to their delivery to N.Y. Testing (Royal's lab); and about events, documents and circumstances that directly contradicted several key Government witnesses.

THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES RELITIGATION OF THE SAME ISSUE IN A FEDERAL COURT AND VICE VERSA. HOWEVER, A REVIEW IS AVAILABLE WHERE A DEFENDANT CLAIMS THAT HIS CONSTITUTIONAL RIGHTS HAVE BEEN DISREGARDED.

The case in point is *Wally v. Johnston*, 316 US 101 (1942). The doctrine of collateral estoppel represents a choice between the competing values of correctness, uniformity and repose. Reexamination of an issue may well demonstrate that its previous resolution was incorrect as a result of such factors as better evidence and better decision-making. This case violates all of the authorities on arson investigation and allows a

conviction to stand when the proof is NOT BEYOND A REASONABLE DOUBT. There is no general rule of life that an issue once determined may never be reexamined, although such reexamination will not necessarily yield a better result. The intent of finality of litigation must yield where the *interest of justice* would make unfair the strict application [of collateral estoppel]. *United States v. Ohio Power Company*, 353 U.S. 98 (1957). In this case effective appellate review will focus on the failure of any government agency to conduct an investigation, withholding of exculpatory evidence, perjury of key Government witnesses, fabrication of evidence, alteration of documents and obstruction of justice.

The Doctrine of Collateral Estoppel is limited by consideration of DUE PROCESS. Relief in this case should be granted because equitable principles encourage a conclusion that obstruction of justice occurred in light of modern concepts of justice. *Fay v Noia*, 372 U.S. 391 (1963)

Newly discovered evidence is a means whereby American criminal procedure can undo an injustice 8 J Moore, Federal Practice, Section 33.03 (2d 1980 Revised) page 33-17. Such a motion will be granted where: 1. the evidence was discovered after the trial; 2. the failure to learn of the evidence at the time of the trial was not due to defendant's lack of diligence; 3. the new evidence is material to the issues at trial; and 4. the new evidence is of such a nature that it would probably, or in the case of perjury POSSIBLY produce an acquittal in the event of a retrial, *id.* page 33-18; *see also United States v. Johnson*, 327 US 106 (1946) Note 4 and *United States v. Miller*, 411 F2d 825 (2d Cir. 1969).

A convicted defendant bears "a very heavy burden" to demonstrate that the evidence at trial was insufficient to prove his guilt beyond a reasonable doubt. *United States v. Carson*, 702 F2d 351, 361 (2d Cir.) *cert. denied* 462 U.S. 1108 (1983). "A jury's verdict will be sustained if there is substantial evidence taking the view most favorable to the government, to support it." *United States v. Nersesian*, 824 F.2d 1294, 1324 (2d Cir.) (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942), *cert. denied*, 484 U.S. 957 (1987). Where "any rational trier of fact

could have found the essential elements of the crime, the conviction must stand. *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986). However Justices Van Graafeiland and Meskill (same judges who heard Gelb's criminal appeal and denied his Motion for Reconsideration), in *United States v. John A. Mulheren, Jr.*, No. 1557-August Term, 1990 on page 6270, admonished that "in America we still respect the dignity of the individual, and [a defendant] . . . is not to be imprisoned except upon definite proof of a specific crime." *United States v. Bufalino*, 285 F.2d 408,420 (2d Cir. 1960). To that end, it is "imperative that we not rend the fabric of evidence and examine each shred in isolation; rather, the reviewing court must use its experience with people and events in weighing the chances that the evidence correctly points to guilt against the possibility of innocence or ambiguous inference." *United States v. Redwine*, 715 F.2d 315, 319 (7th Cir.1983) (quoting *United States v. Kwitek*, 467 F.2d 1222, 1226 (7th Cir. *cert. denied*, 409 U.S. 1079 (1972), *cert. denied* 467 U.S. 1216 (1984)

GELB WAS DENIED DUE PROCESS OF LAW WHEN THE SECOND CIRCUIT DID NOT CONSIDER THE FALSE TESTIMONY OF KEY GOVERNMENT WITNESSES AND THE POSSIBILITY (NOT PROBABILITY) THAT THE JURY WOULD COME TO A DIFFERENT DECISION.

Where a conviction is bottomed even in part upon the perjured testimony of a material Government witness, (Doran, Russo, DeMarco, Chmiel, Sr. and Chmiel, Jr.) the Court will not stop to inquire as to the precise effect of the perjury but will order a new trial if without the perjury the jury might not have convicted. *United States v. Polisi*, 416 F.2d 573, 577 (2d Cir. 1969), citing *Mesarash v. United States*, 352 US 1 (1956). Thus the alleged perjury of a main prosecution witness (five witnesses in this case) is grounds for a new trial. *United States v. Suton*, 455 F.2d 974 (9th Circuit 1972), *see also Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) *Cert denied* 430 US 959 (1977). A new trial is required if the alleged false testimony at the defendant's trial could in any reasonable likelihood have affected the judgment of the jury. *United States v. Butler*, 567 F.2d

885 (9th Cir. 1978). And now in *U.S. v. Wallach, et al.*, (Nos. 181, 182, 183-August Term, 1990) Justice Meskill (who was on Gelb panel) stated "where the prosecution knew or should have known of the perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Perkins v. LeFebre*, 691 F.2d 616, 619 (2d cir. 1982) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Sanders v. Sullivan*, 863 F. 2d 218, 225 (2d Cir. 1988). If the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *United States v. Stofsky*, 527 F. 2d 237, 243 (2d Cir. 1975) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959), *cert. denied*, 429 U.S. 819 (1976). The Assistant U.S. Attorney knew or should have known that the fire marshal had conducted an investigation and that the results proved that an arson did not occur; or if he did not conduct the standard investigation that he did not believe an arson occurred. Also the Assistant U.S. Attorney knew or should have known of the exculpatory evidence in the files of the Bureau of Alcohol, Tobaco and Fire Arms showing that the samples could not have been exposed to heat or environment. Where the government was unaware of a witness' perjury, a new trial is warranted if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony the defendant would most likely not have been convicted." *Sanders v. Sullivan*, 863 F.2d 218 at 226; (2d Cir. 1988) *see also United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975) (The test "is whether there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.") In the Gelb case the newly discovered evidence demonstrates that at least five key government witnesses committed perjury. Considering the wealth of information, evidence and testimony, the Court could (and probably would have determined that ". . . the jury probably would have altered its verdict if it had the opportunity, not only upon the factual elements of the government's case but also upon the credibility of the government's witness." *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975). The Courts have consistently reversed on these grounds; the Second Circuit did not even provide the effective Appellate Review and although

it "effectively dropped the arson counts from the case (*United States v. Gelb*, 700 F.2d 875, 2d Cir. 1983) it did not reverse the arson (mail fraud) counts and did not consider the affect of the allegation of arson on the other mail fraud counts.

THE SECOND CIRCUIT ERRED WHEN IT SUBSTITUTED ITS VIEW FOR THAT OF THE JURY WHEN IT RULED THAT THE MAIL FRAUD CONVICTION WAS SUSTAINED BY EVIDENCE WHOLLY INDEPENDENT FROM THE FACTS PROVING THE ARSON.

All of the mail fraud counts have inextricably intertwined within them the arson issue. If the issue of arson is removed from this trial, an entirely different litigation is presented. After all, an insurance claim is an estimate that is the basis for negotiations to reach a settlement after a loss. If there is a dispute, it should be resolved between the insured and the insurer in a civil case, not be the subject and sole predicate of a criminal prosecution.

There are generally two elements to the offense of mail fraud; since only a "scheme to defraud" and not an actual fraud is required for conviction, the Second Circuit has said that "it is not essential that the Government allege or prove that purchasers were in fact defrauded." *United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966) *cert. denied* 385 US 1001 (1967), but this does not mean that the Government can escape the burden of showing that some actual harm or injury was contemplated by the schemer. If there is no proof that the defendants expected to get "something for nothing" *Harrison v. United States* 200 F 62 6th Cir. 1812) a fraud does not exist. Absent the arson the critical factor for a scheme does not exist. If there were no arson, a claim could only arise after an accidental fire. There must be an intent to injure or defraud in the defendant's falsehoods, *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180, 1181 (2d Cir. 1970). The record reflects a claim that was prepared by insurance adjusters (Royal's and Gelb's working together) who computed a loss of $684,000 based on "actual value not to exceed replacement cost". The insurance coverage was for only

$500,000, almost a $200,000 difference between the estimated loss and the coverage. There was no coverage for Gelb's leasehold valued at not less than $500,000. The loss of the leasehold would be a sufficient deterrent to causing the fire, but when coupled with the loss of Professional files the deterrent is total. Gelb's net worth of approximately four million dollars mostly in cash and real estate (other than the leasehold) overrode any need to recover $500,000 of insurance.

The Government relied on *Mishan v. United States*, 345 F.2d 790 (5th Cir.1965) where the insured was insured for $140,000, suffered a loss of $40,000, but submitted a claim for $100,000. Gelb's case is distinguishable because Gelb's loss, without the leasehold was greater than the insurance coverage.

ROYAL DEPRIVED GELB OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN IT WITHDREW ITS COUNTERCLAIM FOR APPROXIMATELY $100,000

When the Second Circuit, in *Gelb v. Royal Globe*, 798 F.2d 38 (2d Cir. 1986) remanded the question of arson for a retrial if Royal wanted to prevail on its counterclaim for approximately $100,000 Gelb would have been afforded the opportunity to confront all evidence and witnesses at one time in one forum and get a full and fair trial during which he could prove his innocence. Royal by withdrawing its counterclaim deprived Gelb of his Constitutional right to Due Process and the resolution of the questions of perjury and obstruction of justice which fall at the doorstep of Royal.

GELB WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN THE DISTRICT COURT GRANTED SUMMARY JUDGMENT ON ROYAL'S MOTION TO DISMISS GELB'S CLAIM FOR INSURANCE PROCEEDS.

Royal had moved the District Court (Constantino, D.J.) (for Summary Judgment dismissing Gelb's claim for insurance proceeds and for a judgment for $100,000 for monies paid as a result of the fire. Summary Judgment was granted on both motions.

The Second Circuit has explicitly and repeatedly admonished that "summary judgment is a harsh remedy to be granted only when there are no material issues of facts to be tried." *Fili Moretti Cereali v. Continental Grain Co.*, 565 F.2d 563 (2d Cir. 1977), *see also Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317 (2d Cir.1975). Further, "summary judgment is proper only when the record clearly establishes that no genuine issue of material facts remain to be tried." *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theaters, Inc.* 388 F.2d 272, 279 (2d Cir. 1967); *see also Cali v. Eastern Airlines Inc.* 442 F.2d 65, 71 (2d Cir. 1971).

Moreover, when the Court considers a motion for Summary Judgment, it must resolve all ambiguities or all reasonable inferences in favor of the party against whom summary judgment is sought, *United States v. Diebold, Inc.*, 369 US 654 (1962) with the burden on the moving parties to demonstrate the absence of any material factual issue generally in dispute. *Adickes v. Kress Co.*, 398 US 144 (1970). Such a burden is clearly appropriate, given the nature of Summary Judgment, which is a *"drastic device* because its prophylactic function when exercised cuts off a party's right to present his case to the jury." *Donnelly v. Guion*, 467 F.2d 290, 291 (2d Cir. 1972).

SUMMARY

Gelb was denied his Constitutional right to Due Process of Law because this case has never enjoyed a full and fair trial where all of the witnesses and evidence were presented at one time and in one forum. Although the records suggest that every judicial advantage was provided, the opposite is true. The Second Circuit acknowledged that there should be "effective appellate review" and that the question of whether an arson occurred should be resolved. This issue has never been addressed. In addition Gelb was deprived of Due Process when he did not receive effective appellate review, which would have focused on the new evidence, perjury of key Government witnesses, fabrication of evidence, creation of or alteration of documents and obstruction of justice, all impacting on the evidence and testimony and which infected the trial proceedings, and interfered with the

jury's ability to arrive at a proper conclusion. A reversal of a conviction should result when new evidence is presented and perjury is alleged.

The Second Circuit should have appreciated that the arson was inextricably intertwined with all of the mail fraud counts and that a reversal of the explosive counts demanded that the mail fraud counts be reversed.

Royal, the real prosecutor, has sought every procedural and legal means to prevent the release of its files which A fortiori must be specious.

The Civil case (*Gelb v. Royal*) is directly interrelated. Summary Judgment should not have been granted on any of the issues, because there are unanswered questions. A conclusion that no arson occurred removed the critical event necessary to a scheme and therefore a conviction on the mail fraud statutes.

CONCLUSION

For any or all of the reasons set forth above the Court should grant this Petition for a Writ of Certiori. If the Court does not wish to focus on the issues then it is respectfully requested that the case be remanded for Effective Appellate Review and the resolution of the unanswered question of whether an arson occurred, did Gelb commit the arson and absent the arson was there a scheme to defraud.

Such action will provide Gelb with his Constitutional Right to Due Process of Law and the "INTEREST OF JUSTICE" will be served.

Respectively submitted,

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Dated: October 1, 1991

APPENDIX

APPENDIX A

UNITED STATES of America, Appellee,

v.

Joseph GELB, Defendant-Appellant.

Nos. 643, 644, Dockets 82-1026, 82-1264.

United States Court of Appeals,
Second Circuit.

Argued Dec. 14, 1982.

Decided Feb. 15, 1983.

Defendant was convicted before the United States District Court for the Eastern District of New York, Jacob Mishler, J., of maliciously damaging and destroying his business premises by means of an "explosive," using an "explosive" to commit a felony, and eight counts of mail fraud, and he appealed. The Court of Appeals, Meskill, Circuit Judge, held that: (1) uncontained gasoline is not "explosive" within statutory definition of Explosive Control Act, and (2) evidence was sufficient to support mail fraud convictions, notwithstanding Government's alleged failure to specifically prove that defendant's actual losses were less than amounts to which he was lawfully entitled under terms of insurance policies.

Affirmed in part, reversed in part.

Van Graafeiland, Circuit Judge, concurred in part and dissented in part and filed opinion.

* * *

Barry Bassis, The Legal Aid Soc., Federal Defender Services Unit, New York City, for defendant-appellant.

Max Sayah, Asst. U.S. Atty., E.D.N.Y., Brooklyn, N.Y. (Raymond J. Dearie, U.S. Atty., Mary McGowan Davis, Asst. U.S. Atty., E.D.N.Y., Brooklyn, N.Y.), for appellee.

Before OAKES, VAN GRAAFEILAND and MESKILL, Circuit Judges.

MESKILL, Circuit Judge:

Joseph Gelb appeals from the judgment of the United States District Court for the Eastern District of New York, Mishler, *J.*, after a jury trial convicting him of (1) maliciously damaging and destroying his business premises by means of an "explosive," 18 U.S.C. § 844(i) (1976); (2) using an "explosive" to commit a felony, 18 U.S.C. § 844(h) (1976); and (3) eight counts of mail fraud, 18 U.S.C. §§ 1341, 1342 (1976). Gelb raises four claims on appeal, arguing that (1) uncontained gasoline is not an "explosive" or "incendiary device" within the meaning of 18 U.S.C. § 844(j) (1976); (2) the evidence submitted at trial was insufficient as a matter of law to convict him; (3) the government failed to prove an intent to defraud under 18 U.S.C. §§ 1341, 1342 (1976); and (4) the court abused its discretion when denying his Rule 33 motion for a new trial.

We find that uncontained gasoline is not an "explosive" or "incendiary device" within the meaning of 18 U.S.C. § 844(j) (1976) and therefore reverse the convictions obtained under that statute. Because the additional claims raised by the appellant lack substantial merit, we affirm the decision of the district court on the remaining counts.

BACKGROUND

Appellant Joseph Gelb owned and operated several businesses from a commercial building located at 10-12 Franklin Place in Woodmere, New York. During the evening of April 26, 1980, the Franklin Place premises were destroyed by fire. Subsequent investigations by the Nassau County Fire Marshall's office revealed that the fire was intentionally set by use of uncontained gasoline.

Appellant Gelb was indicted and charged with one count of maliciously damaging and destroying a business premises by

means of an "explosive," 18 U.S.C. § 844(i) (1976); one count of using an "explosive" to commit a felony, 18 U.S.C. § 844(h) (1976); and eight counts of using the mails to defraud an insurance company, 18 U.S.C. §§ 1341, 1342 (1976). At trial, the government's case was based principally on the testimony of four expert witnesses who substantially corroborated the prosecution's theory that the Franklin Place fire was intentionally set by means of an accelerant. Two of these experts, Thomas Russo and Michael DiMarco, testified that they removed three debris samples from the fire scene shortly after the blaze, and based upon subsequent gas chromotograph testing, they detected the presence of gasoline in two of these samples. Mr. Robert Doran, a supervising fire investigator for Nassau County, testified that he examined the scene later that night, and in his expert opinion, the fire was caused by the ignition of a volatile liquid.

Additional circumstantial evidence revealed that Gelb had more than doubled his insurance coverage approximately three weeks before the blaze and that immediately after the fire had offered to sell his business for one dollar if the prospective buyer would assume his outstanding business debts. The government also showed that Gelb entered the premises shortly before the fire and that he was observed leaving the building approximately five minutes before the blaze was reported. Finally, the evidence disclosed that the appellant grossly inflated his fire loss and fabricated some losses when submitting his insurance claim.

The trial commenced on October 19, 1981, and the jury returned its verdict approximately three weeks later, on November 5, 1981, finding the defendant guilty of all charges in the indictment. Gelb was sentenced on January 18, 1982, to a prison term of two years on each count, sentences to run concurrently. After trial, counsel for the appellant submitted a motion pursuant to Fed.R.Crim.P. 33 asking the court to order a new trial based upon evidence allegedly discovered after trial. The district judge denied the appellant's Rule 33 motion, and the present appeal followed.

DISCUSSION

A. *Is Uncontained Gasoline an "Explosive" Within the Meaning of 18 U.S.C. § 844(j) (1976)?*

The "Explosive Control Act," which constitutes Title XI of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, Title XI, § 1102(a), 84 Stat. 922, 952 (1970) (codified at 18 U.S.C. §§ 841-48 (1976)), creates a comprehensive regulatory scheme to control the flow of "explosives" travelling in interstate commerce. The Act also contains a strong penal section which extends federal jurisdiction to those crimes where explosives are used to damage or destroy property or to commit a felony. See 18 U.S.C. § 844(h) & (i) (1976).

"Explosives" are defined in the penal section of the Act as:

> (j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j) (1976). The definition in section 232(5), which is incorporated by reference in section 844(j), further defines "explosive" to include:

> (5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives,

> (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

18 U.S.C. § 232(5) (1976).

The indictment charged the appellant with using an "explosive" to damage and destroy a commercial building and commit a felony in violation of 18 U.S.C. §§ 844(h) & (i) (1976). The parties concede for purposes of this appeal that the Franklin Place fire was caused by use of uncontained gasoline, an accelerant frequently used in the commission of arson. Indeed, the facts presented at trial revealed a classic case of arson, but failed to disclose any evidence of an explosion or bombing. Hence, we must determine first whether Congress intended through the Explosive Control Act to extend *federal jurisdiction* to those crimes involving common law arson, and more particularly whether uncontained gasoline is properly included within the statutory definition of "explosive."

The issue presented here is not easily resolved, as evidenced by the substantial division among the federal circuit courts that have considered this question. Those circuits favoring a narrow reading explain that the Act was intended to assist federal authorities in their efforts to control the rash of "political bombings" by subversive groups in the late 1960s and was never envisaged as an anti-arson bill. *See United States v. Gere*, 662 F.2d 1291, 1296 (9th Cir.1981); *United States v. Birchfield*, 486 F.Supp. 137, 138-39 (M.D.Tenn.1980). The courts favoring a broad reading of the Act to include substances like uncontained gasoline rely on the expansive definitional language in the statute and scientific evidence showing that chemical compounds such as gasoline may cause an explosion under certain atmospheric

conditions. *See United States v. Agrillo-Ladlad*, 675 F.2d 905, 907 (7th Cir.1982); *United States v. Poulos*, 667 F.2d 939, 941-42 (10th Cir.1982); *United States v. Hepp*, 656 F.2d 350, 352-53 (8th Cir.1981).

[1] We are persuaded by the former view. The legislative history of the Act speaks of the dangers posed by subversive groups in the society. The perceived threat lay not so much in ideology or political objective, but rather focused on the alarming trend during the late 1960s when "selective bombing" emerged as a frequent vehicle for extreme social and political protest:

> Mr. Chairman, I am pleased that today we begin hearings on several bills designed to strengthen Federal laws against the illegal use of explosives. Last year we witnessed in this country a violent and tragic increase in bombings. Radicals from the left and from the right spread their terror throughout the land, bombing police stations, college campuses, dormitories, cafeterias, ROTC offices, high schools, antiwar coffeehouses, homes of college administrators and teachers, homes of prosecutors, theaters, public utilities, Selective Service offices, induction centers, stores, corporate headquarters, defense plants, and Federal office buildings.

Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 Before Subcomm. No. 5 of the House Comm. on the Judiciary (Hearings), 91st Cong., 2d Sess. 33 (1970) (remarks of Rep. McCulloch); *see id.* at 83 (remarks of Eugene Rossides, Asst. Sec. of Treasury), 288 (remarks of Rep. Goldwater), 296 (remarks of Rep. Wylie—"The alarming increase in the use of bombs as weapons of terror, intimidation, destruction and death is a threat to social decorum and innocent law-abiding citizens that this society can no longer tolerate.").

As often occurs in the legislative forum, the Act appears to have been adopted specifically in response to an emerging social

concern, in this case the tragedy of lost lives and damage to property caused by the bombings. *See, e.g., Hearings, supra,* at 129 (remarks of Hollis Dole, Asst. Sec. of Interior), 282 (remarks of Rep. Brotzman), 296 (remarks of Rep. Wylie); *see also* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 6 (1970) (*House Report*), *reprinted in* 1970 U.S.Code Cong. & Ad.News, 4007, 4013 ("Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective State or local controls clearly attest to the urgent need to enact strengthened Federal regulation of explosives.").

The above-cited history strongly supports the view that the Act was envisaged as anti-bombing, *not anti-arson*, legislation. We find nothing in the language or legislative history of the Act to challenge this conclusion. Moreover, responsibility for the investigation and prosecution of crimes involving common law arson has traditionally been left to the states, and we are reminded that: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

[2] The government would have us view the expansive language in 18 U.S.C. § 844(j) (1976) as a clear manifestation of congressional intent to include uncontained gasoline within the statutory definition of "explosive." "Explosive" is defined in that section to include, *inter alia:*

> [A]ny chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

We find this language, at best, ambiguous. The House Report provides some guidance by explaining that the section 844(j)

penal definition of "explosive" was "broadened to include incendiary devices such as 'Molotov cocktails.' "[1] *House Report, supra, reprinted in* U.S.Code Cong. & Ad.News at 4011. There is, of course, a serious qualitative difference between bombings caused by use of Molotov cocktails and the typical arson that we perpetrated here. We will not read a general anti-arson intent into legislation that was designed to eradicate the threat of bombings by subversive groups.

Finally, we take judicial notice that Congress has recently enacted legislation to meet the arson threat. *See* Anti-Arson Act of 1982, Pub.L. No. 97-298, 96 Stat. 1319 (1982)(Anti-Arson Act). In the Anti-Arson Act, Congress has stated unequivocally that federal authorities will henceforth share responsibility with state officials to investigate and prosecute arson crimes. *See* 128 Cong.Rec. 4957 (1982) (remarks of Rep. Hughes); 4958 (remarks of Rep. McClory). Congress could have accomplished this objective twelve years earlier when enacting the Explosive Act, but chose instead to focus on the more imminent problem of terrorist bombings. We defer to the lawmaking wisdom of the national legislature.

The convictions obtained under the Explosive Control Act, specifically counts one and five in the indictment, are hereby reversed.

B. *Sufficiency of the Evidence*

The appellant claims that the evidence presented at trial was insufficient as a matter of law to sustain his convictions. Gelb specifically asserts that the government failed to prove that he in fact set the Franklin Place fire. In view of our disposition of the preceding issue, we need not decide this question. Gelb's claim, even if we were to consider it favorably, is relevant only insofar as it challenges the evidence relating to the "explosives"

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[1] Actually Molotov cocktails were already included in the definition of "explosive," albeit by incorporation of section 232(5) by reference. The report might well have cited a better example of incendiary devices included.

counts. The mail fraud convictions were sustained by evidence wholly independent from those facts proving the arson.

C. *Mail Fraud Counts*

[3, 4] To prove mail fraud under 18 U.S.C. §§ 1341, 1342 (1976), the prosecution must show that the defendant (1) participated in a scheme to defraud; and (2) knowingly used the mails to further the scheme. *See United States v. Corey*, 566 F.2d 429, 430 n.2 (2d Cir.1977); *United States v. Cyphers*, 556 F.2d 630, 632 (2d Cir.), *cert. denied*, 431 U.S. 972, 97 S.Ct. 2937, 53 L.Ed.2d 1070 (1977). Proof of a fraudulent scheme requires evidence showing a specific intent to defraud. *See United States v. Widgery*, 636 F.2d 200, 202 (8th Cir.1980); *United States v. Beecroft*, 608 F.2d 753, 756-57 (9th Cir.1979).

The appellant claims that his mail fraud convictions should be reversed because the government failed to prove an intent to defraud. Gelb's argument appears to be that even if he were to concede intentional misrepresentations in his insurance claim, no intent to defraud is shown unless the government specifically proves that his actual losses were less than the amounts to which he was lawfully entitled under the terms of his insurance policies. Gelb points out that his proof of loss claim detailed $684,000 in damages due to the fire, which was $184,000 more than his $500,000 insurance coverage. He would have us rule that unless the govenrment proves more than $184,000, in falsely-stated losses, no conviction may be obtained under the mail fraud statute.

[5-7] There is no requirement under 18 U.S.C. §§ 1341, 1342 (1976) that the government prove a specfic amount defrauded—the proof need only be sufficient to establish a specific intent. Moreover, specific intent need not necessarily be proved by direct evidence, but may also be inferred from the defendant's actions and other circumstantial evidence. *See United States v. Widgery*, 636 F.2d at 202; *United States v. Beecroft*, 608 F.2d at 757. We must view the evidence in the light most favorable to the government. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457,

469, 86 L.Ed. 680 (1942); *United States v. Candella*, 487 F.2d 1223, 1228 (2d Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1563, 39 L.Ed.2d 872 (1974). On this record the jury could find that the appellant intended to defraud his insurer. The trial testimony revealed that Gelb grossly inflated losses and asked his employees to verify proof of loss forms which were wholly inaccurate. The evidence is sufficient to sustain a conviction under the mail fraud statute.

D. *Rule 33 Motion*

Gelb finally contends that the district court committed reversible error under Fed.R.Crim.P 33 when it denied his motion for a new trial. He contends that evidence discovered after trial would have substantially contributed to his defense if presented to the jury and cites four examples of this "newly discovered" evidence:

> 1. That Fire Investigator Robert Doran committed perjury when he testified at trial that he did not retrieve samples of debris from the fire site. The claim of perjury is that the next morning on April 27, Doran obtained such samples which "it must be presumed, upon analysis revealed no presence of gasoline." (Aff. ¶ 15(b)).
>
> 2. The first fireman to arrive at the premises did not detect an odor of gasoline. Doran testified that he detected an odor of gasoline some six hours after the fire started.
>
> 3. Firefighters used a power saw on the roof fueled by gasoline which could have been the source of the gasoline odor.
>
> 4. "Unassailable scientific proof, based on a recently performed series of novel experiments, that the wood debris samples recovered by insurance company investigators. . .were, in fact, contaminated with gasoline at some point after the fire." (Aff. ¶ 15(a)).

See United States v. Gelb, CR 81-00349, slip op. 1, 3-4 (E.D.N.Y. July 2, 1982 (Memorandum of Decision and Order), reprinted in Br. of Appellee, Ex. B, at 3-4.

The evidence cited by Gelb is probative, if at all, only insofar as it relates to the "explosives" charges. The mail fraud convictions were proved by evidence that is independent of the specific facts offered by Gelb. Accordingly, because we are reversing the convictions obtained under the Explosive Control Act on the other grounds, there is no need to consider this Rule 33 claim.

The judgment of the district is reversed on counts one and five. We affirm the district court's judgment on the remaining eight counts in the indictment.

VAN GRAAFEILAND, Circuit Judge, concurring in part and dissenting in part:

> TAKOMA PARK, MD.—Gasoline vapor seeped through sewer lines and into homes yesterday, setting off several explosions and fires, forcing more than 2,000 people to evacuate and closing at least two schools, police said.
>
> Fire officials said there were at least eight explosions and fires in single-family homes in two counties but all were under control by early afternoon. (*United Press Bulletin*, December 17, 1982.)

In 1970, Congress made it unlawful to maliciously damage or destroy by means of an explosive a building used in any activity affecting interstate commerce, 18 U.S.C. § 844(i), and defined "explosive" in part as "any chemical compounds" containing "oxidizing and combustible units . . . in such proportions . . . that ignition by fire . . . may cause an explosion", 18 U.S.C. § 844(j). My colleagues now hold that the jury which convicted appellant of violating this statute should not have been permitted to find, as it did, that "gasoline vapors mixed with air" is an explosive. I disagree.

Before expanding on the reasons for my disagreement, I think it well to define clearly the issue presented on this appeal. Affirmance of appellant's conviction does not hinge upon whether "uncontained" gasoline is an explosive, but upon whether evaporating gasoline, contained or confined within the four walls of a closed structure, may be found to be an explosive. If the unhappy residents of Takoma Park, combing through the debris of their destroyed homes, were asked this question, their answer, like that of the jury below, would be a resounding "yes".

The same answer would be given by experts in the field of fire prevention and control:

> Flammable vapor-air explosions most frequently occur in confined spaces such as containers, tanks, rooms, or buildings. The violence of flammable vapor explosions depends upon the nature of the vapors as well as the quantity of vapor-air mixture and the enclosure containing the mixture. . .
>
> Gasoline is the most widely used flammable liquid. Its generation of flammable vapors at ambient temperatures is common knowledge.

National Fire Protection Association, *Fire Protection Handbook* 4-26 (15th ed. 1981); *see also* 13 National Fire Protection Association, *National Fire Codes* 328-17, 329-8, 329-9 (1981).

That gasoline placed in an enclosed area may result in an explosion is a fact familiar to any reader of negligence cases. *See e.g., Commercial Ins. Co. v. Ferguson*, 285 F.2d 527 (5th Cir.1961); *Homes Ins. Co. v. Hamilton* 253 F.Supp. 752 (E.D.Ky.1966) *rev'd*, 395 F.2d 108 (6th Cir.1968); *Jenkins v. 313-321 West 37th St. Corp.*, 284 N.Y. 397, 31 N.E.2d 503 (1940); *Daggett v. Keshner*, 6 A.D.2d 503, 179 N.Y.S.2d 428, (1958), *aff'd*, 7 N.Y.2d 981, 199 N.Y.S.2d 41, 166 N.E.2d 324 (1960). It is not surprising, therefore, that legislative and administrative bodies, and lexicographers have defined gasoline for many years as an explosive. *Huckleberry v. Mo. Pacific R. Co.*, 324 Mo. 1025,

26 S.W.2d 980, 986 (1930). To reverse appellant's conviciton we must conclude of necessity that, when Congress enacted section 844(j), it either rejected this universally accepted definition or, for some reason, deliberately excluded malicious users of this explosive from prosecution. I believe that it did neither.

To resolve an issue of statutory analysis, we must start with the words of the statute itself, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive", *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Under the clear language of section 844(j), any chemical compound that may cause an explosion when ignited by fire is an explosive. The Treasury Department's Bureau of Alcohol, Tobacco and Firearms, which is charged by Congress with investigating and enforcing the provisions of section 844, *see* 18 U.S.C. §§ 846, 847, and whose interpretation therefore must be given "great deference." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), believes that section 844(j) means exactly what it says:

> Under Title XI of the Organized Crime Control Act of 1970 (Title 18 U.S.C., chapter 40, section 844(j), the definition of "EXPLOSIVE" covers generic explosive materials (*i.e.* dynamite), certain incendiary devices, AND any chemical compound (such as gasoline), combined with oxidizing units (air) that causes (or may cause) an EXPLOSION if ignited by fire and some others means of detonation. The additional element required by this statute is that the TARGET of the arson (explosives) related incident must be connected with INTERSTATE or foreign commerce. Hence, if such "EXPLOSIVES" are used to perpetrate an arson, and the interstate or foreign commerce element exists, then ATF's jurisdiction under the statute (especially section 844(i)) can be applied.

Department of Treasury *1979 Annual Report of the Bureau of Alcohol, Tobacco and Firearms* 41; *1980 Report* 35.

According to the Bureau's *1980 Report*, during that year it investigated 603 "Arson Incidents", which resulted in property damage exceeding $152,000,000. Gasoline made up 74.3% of the known accelerants involved. A substantial number of indictments have been secured, many of which unfortunately may be invalidated by my colleagues' interpretation of the statute.

When a statute is clear and unambigious, as I believe section 844(j) is, there is little reasons to delve into its legislative history. *Wirtz v. Local 191, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 321 F.2d 445, 448 (2d Cir.1963) Moreover, judicial wisdom has long dictated that comments by individual congressmen, other than the sponsors of the legislation in question, are not appropriate sources of information from which to discover over-all legislative intent. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318, 17 S.Ct. 540, 550, 41 L.Ed. 1007 (1897); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96, 71 S.Ct. 745, 751, 95 L.Ed. 1035 (1951) (Jackson, J. concurring). This is particularly true when the comments in question are of the flag-waving type which appear to be intended primarily for publication in home-town newspapers. To the extent that legislative history is relied upon, my view of the history of section 844(j) accords with that of the Seventh Circuit as expressed in *United States v. Agrillo-Ladlad*, 675 F.2d 905, 907-11 (7th Cir.) *cert. denied*, ____ U.S. ____. 103 S.Ct. 66, 74 L.Ed.2d 67 (1982).

The Explosive Control Act of 1970, Pub.L. No. 91-452, Title XI § 1102(a), 84 Stat. 922, 952 (1970) (codified at 18 U.S.C. §§ 841-48 (1976)), was the successor to the Civil Rights Act of 1960, Pub.L. No. 86-449, 74 Stat. 86, 87, which is repealed. The Civil Rights Act dealt with the interstate transportation of explosives with knowledge or intent that they would be used to damage or destroy a building, and the interstate flight from prosecution or confinement after conviction for unlawfully damaging or destroying a building by fire or explosive. Although the

1960 Act became effective long before "the rash of 'political bombings' by subversive groups in the late 1960s", upon which my colleagues place great emphasis, the 1960 Act defined "explosives" in pertinent part in the same language as did the 1970 Act, *i.e.*, "any chemical compounds. . . that contains any oxidizing and combustible units. . . in such proportions . . . that ignition by fire. . . may cause explosion." When Congress enacted the 1970 Act, it intended to strengthen and expand the criminal prohibitions that applied to the intentional use of explosives, not to weaken them. *See* H.R.Rep. No. 1549, 91st Cong.2d Sess., *reprinted* in 1970 U.S.Code Cong. & Ad.News 4007, 4013.

The provisions of section 844 were derived from a bill submitted by the administration, H.R. 16699, and a bill introduced by Congressman Celler, H.R. 17154. Congressman Celler's bill contained the broad definition of "explosives" that was incorporated in section 844(j). In response to an inquiry from the House Committee on the Judiciary which was considering the several bills, Assistant Secretary of the Interior Hollis Dole informed the Committee that "explosives" as defined in Congressman Celler's bill would "include any highly flammable substance such as gasoline, cleaning fluids and many other commercial solvents." H.R. 17154, *Explosives Control* 157.

The administration's bill, which contained a narrower definition of "explosives" became section 841(d), the regulatory provision of the 1970 Act. The House Judiciary Committee took pains to note that the term "explosives", as used in section 841(d), does not include gasoline. 1970 U.S.Code Cong. & Ad. News at 4041. The Bureau of Alcohol, Tobacco and Firearms followed suit by providing that its licensing and use regulations do not apply to gasoline manufactured, imported, or distributed for its "intended purposes". 27 C.F.R. § 55.141. Because the exceptions applicable to the regulatory provisions are inapplicable to section 844(j), 1970 U.S.Code Cong. & Ad.News at 4047, these specific references to gasoline must be deemed significant when consideration is being given to the latter section.

My colleagues' reliance upon the passage of the Anti-Arson Act of 1982 to support their holding that appellant did not violate section 844(j) is, I suggest, misplaced. The 1982 Act was passed because (1) it was difficult to prove that arson damage was caused by means of an explosive, and (2) the courts that decided *United States v. Gere*, 662 F.2d 1291 (9th Cir.1981) and *United States v. Birchfield*, 486 F.Supp. 137 (N.D.Tenn.1980) had refused to treat gasoline as a "mechanical mixture. . . that contains any oxidizing and combustible units. . . in such proportions. . . that ignition by fire. . . may cause an explosion." H.R. No. 678, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News, 2631, 2632. In enacting the Anti-Arson Act, Congress reworded subdivisions (e), (f), (h), and (i) of section 844 so that no court thereafter could misinterpret them.

I would affirm appellant's convictions on all counts.

APPENDIX B

Joseph GELB, Plaintiff-Appellant,

Joseph Gelb & Company, d/b/a Joseph Gelb, Small Business Advisors, Inc., Joel Management Corp., Whitehill Systems, Inc., Whitehill Brokers Co., and Whitehill Computors Systems, Inc., Plaintiffs,

v.

ROYAL GLOBE INSURANCE COMPANY, Defendant-Appellee.

No. 873, Docket 85-7667.

United States Court of Appeals, Second Circuit.

Argued March 7, 1986.

Decided Aug. 8, 1986.

Insured sued fire insurer to recover for fire which destroyed business premises, and fire insurer counterclaimed as subrogee to rights of innocent victim of fire, to whom insurer had made payments, after fire allegedly set by insured. The United States District Court for the Eastern District of New York, Costantino, J., dismissed complaint and awarded judgment plus interest on counterclaim. Insured appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) federal law governed collateral estoppel effect of federal criminal conviction in subsequent diversity action; (2) insurer was entitled to summary judgment on insured's claims on basis of insured's convictions for mail fraud based on submission of fraudulent proof of loss statements which released insurer from obligations under policy; but (3) collateral estoppel did not apply to bar relitigation of issue of whether insured had caused the fire as insured had not received effective appellate review of issue in affirmance of mail fraud convictions.

Affirmed in part, reversed in part, and remanded.

Joseph Gelb, pro se.

James J. Taylor, New York City (Bingham, Englar, Jones & Houston, New York City, on brief), for defendant-appellee.

Before FEINBERG, Chief Judge, and NEWMAN and WINTER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

Plaintiff Joseph Gelb appeals from a judgment of the District Court for the Eastern District of New York (Mark A. Costantino, Judge) dismissing Gelb's complaint against defendant-appellee Royal Globe Insurance Company ("Royal") and awarding Royal $81,499.98, plus interest, on a counterclaim.[1] Gelb contends that the District Court improperly accorded preclusive effect to his prior criminal conviction for mail fraud. For reasons that follow, we hold that Gelb's criminal conviction precluded his own claim but did not justify entering judgment for Royal on its counterclaim. We therefore affirm the dismissal of Gelb's complaint, reverse the entry of judgment on Royal's counterclaim, and remand for a trial on the counterclaim.

Background

Gelb owned businesses located at 10-12 Franklin Place in Woodmere, New York. On April 26, 1980, the Franklin Place premises were destroyed by fire. Investigation revealed that the fire was ignited with the aid of gasoline.

Gelb was subsequently indicted and charged with one count of using an "explosive" to destroy commercial premises in violation of 18 U.S.C. § 844(i), one count of using an "explosive" to commit a felony in violation of 18 U.S.C. § 844(h), and eight counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1342. Three of the mail fraud counts were based on Gelb's alleged misrepresentation to Royal that he had not caused the Franklin

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[1] By order of September 25, 1985, this Court dismissed the appeals of the following plaintiffs: Joseph Gelb & Co., Small Business Advisors, Inc., Joel Management Corp., Whitehill Systems, Inc., Whitehill Brokers Co., and Whitehill Computors Systems, Inc.

Place fire. The remaining five mail fraud counts were based on allegedly inflated damage claims that Gelb sumitted to Royal. The jury convicted Gelb on all ten counts of the indictment. Gelb moved, pursuant to Fed.R.Crim.P. 33, for a new trial as a result of newly discovered evidence that he claimed established his lack of participation in causing the fire. The District Court denied the motion.

Gelb appealed his criminal conviction to this Court. *See United States v. Gelb*, 700 F.2d 875 (2d Cir.), *cert. denied*, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983). We reversed the convictions on the two explosives counts on the ground that gasoline was not an "explosive" within the meaning of 18 U.S.C. § 844(h) and (i). With respect to the convictions on the eight mail fraud counts, we made a disposition that has engendered much of the controversy in connection with the pending appeal. Initially, we noted that "we need not decide" whether Gelb was correct in urging that the evidence was insufficient "to prove that he in fact set the Franklin Place fire." *Id.* at 879. We expressed the view that the mail fraud convictions "were sustained by evidence wholly independent from those facts proving the arson." *Id.* We then ruled that the evidence was sufficient to support the jury's finding that Gelb had submitted false proof of loss forms to Royal, grossly inflating the losses claimed. This finding was critical to conviction on five of the mail fraud counts. Finally, we said we were affirming the conviction on all eight mail fraud counts. Three of those counts, however, rested exclusively on the allegation that Gelb had falsely denied to Royal that he had caused the fire, and we had specifically declined to review the sufficiency of the evidence to prove that allegation. In effect, though we technically affirmed the convictions on the three arson-mail fraud counts, we did not review the issue on which they were appealed.[2] Since the sentences on all counts were concurrent, the anomalous disposition had no effect on

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[2] We also declined to consider the denial of Gelb's Rule 33 motion by asserting that his newly discovered evidence related only to the issue of who had caused the Franklin Place fire and that this issue had been removed from the case. *See United States v. Gelb*, *supra*, 700 F.2d at 880.

Gelb's sentence, *but see United States v. Vargas*, 615 F.2d 952 (2d Cir.1980) (limiting the concurrent sentence doctrine as a basis to avoid appellate review). Nevertheless, the anomaly vitally affects the collateral estoppel issues that we now encounter.

Gelb subsequently commenced this diversity action against Royal to recover on his insurance policy for damage caused to his businesses by the Franklin Place fire. Royal, which had paid $81,499.98 to an innocent owner of a Franklin Place property, alleged that Gelb had caused the Franklin Place fire and counterclaimed for $81,499.48 as subrogee. Royal sought summary judgment dismissing Gelb's claim and granting judgment on its counterclaim. Royal argued that Gelb's criminal conviction collaterally estopped him from denying that he had made fraudulent representations to Royal, which barred Gelb's claim, and that he had caused the Franklin Place fire, which entitled Royal to prevail on its counterclaim. The District Court granted Royal's summary judgment motion in all respects, and this appeal followed.

Discussion

[1] 1. *Choice of Law.* Initially, we must decide whether federal or state law determines the collateral estoppel effect of Gelb's criminal conviction in this diversity action. Our analysis begins with *United States v. Frank*, 494 F.2d 145 (2d Cir.), *cert. denied*, 419 U.S. 828, 95 S.Ct. 48, 42 L.Ed.2d 52 (1974). In *Frank*, four defendants were convicted under a variety of federal criminal statutes for committing fraudulent acts. The victim, Marie Dominguez, testified for the prosecution. Dominguez had previously commenced a diversity action in federal court against three of the criminal defendants to recover for the same acts that were the subject of the criminal indictment. In the criminal case the defendants requested a jury instruction concerning Dominguez's credibility in light of her pending civil suit. Specifically, they requested a charge that a criminal conviction would operate as collateral estoppel in the civil suit and that Dominguez therefore had a financial interest in the outcome of the criminal case. The trial judge informed the jury of the existence of Dominguez's civil suit but refused to give the requested charge.

On the appeal of the criminal case to this Court, the defendants argued that New York law would govern the preclusive effect of a federal criminal conviction in a civil diversity case and that New York law would accord collateral estoppel effect to the conviction. The Government argued that federal law would apply and would not give collateral estoppel effect to the conviction. The Government relied on *Kern v. Hettinger*, 303 F.2d 333 (2d Cir.1962), on the choice of law issue. In *Kern*, we held that, in accordance with Fed.R.Civ.P. 41(b), a dismissal for lack of prosecution in a federal diversity action would bar a subsequent diversity action on the same claim, even though the state whose law applied to the second diversity action would not consider such a dismissal preclusive.

Writing for this Court in *Frank*, Judge Friendly rejected the Government's contention that federal law would determine the collateral estoppel effect of a federal criminal conviction in a subsequent diversity case. Judge Friendly read *Kern* to require the application of federal preclusion law in a diversity action only where necessary to vindicate the Federal Rules of Civil Procedure. In other circumstances, such as those presented in *Frank*, he suggested that a federal diversity court should apply New York preclusion law "to reach the same result as would a New York court sitting 'a block away.' " *United States v. Frank*, *supra*, 494 F.2d at 160 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed.2d 2079 (1945)). This suggestion implicitly assumed that a New York court would apply New York preclusion law in determining the collateral estoppel effect of a federal conviction. Ultimately, Judge Friendly relegated his discussion to dictum by noting that the choice of law question had no bearing on the outcome. Since both New York and federal law accord collateral estoppel effect to a criminal conviction in a subsequent civil suit, the trial judge had erred, regardless of choice of law, in refusing to charge that Dominguez had an interest in the outcome of the criminal case. This error was deemed harmless, however, and the convictions in *Frank* were affirmed.

In the pending appeal, the choice of law issue requires fuller exploration. Even though New York and federal law both accept

the general principle that a criminal conviction has collateral estoppel effect in a civil action, we cannot be certain that the two bodies of law would be congruent in their application of the collateral estoppel doctrine to the unusual circumstances presented by the "affirmance" of Gelb's arson-mail fraud convictions.

Although *Frank* suggests that New York collateral estoppel law would apply to the instant controversy, we have concluded that federal law applies for several reasons. Initially, we agree with Judge Friendly that a federal diversity court and a state court should reach the same result in assessing the preclusive effect of a federal criminal conviction. However, we do not accept the assumption implicitly made in *Frank*, which had no bearing on the outcome, that a state court would apply state law in determining the collateral estoppel effect. A state court must apply federal law to determine the preclusive effect of a prior federal question judgment. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62, 104 S.Ct. 1837, 1842-43, 80 L.Ed.2d 356 (1984); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499, 517-20, 24 S.Ct. 154, 160-62, 48 L.Ed.2d 276 (1903). It follows as a matter of course that a federal court should apply federal law in such circumstances. *See Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 243, n. 2 (5th Cir.1983); *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir.1982); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4472 (1981).[3]

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[3] Whose law governs the preclusive effect of a federal diversity judgment would be a more difficult question. In an old line of cases that has never been overruled, the Supreme Court has held that the states may apply their own law to determine the preclusive effect of a federal diversity judgment. *See Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Long Island Loan and Trust Co.*, 172 U.S. 493, 19 S.Ct. 238, 43 L.Ed. 528 (1899); *Metcalf v. Watertown*, 153 U.S. 671, 14 S.Ct. 947, 38 L.Ed. 861 (1894); *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*,120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614 (1887); *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 22 L.Ed. 588 (1875). Federal courts routinely apply state law to determine the preclusive

(Footnote continued)

It might be argued that a different result should obtain where the federal question judgment whose preclusive effect is at issue

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effect of a federal diversity judgment in a subsequent diversity action. *See Iowa Electric Light & Power Co. v. Mobile Aerial Towers, Inc.*, 723 F.2d 50, 52 (8th Cir. 1983); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 851 n. 17 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982); *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119, 122 (7th Cir.1981); *Hayles v. Randall Motor Co.*, 455 F.2d 169, 173 (10th Cir.1971); *Makariw v. Rinard*, 336 F.2d 333, 334 (3d Cir.1964).

However, *Dupasseur v. Rochereau, supra*, and its progeny may have been eroded by two factors. First, the Conformity Act, which required federal courts to apply state procedural rules and upon which the Supreme Court relied in *Dupasseur, supra*, 88 U.S. (21 Wall.) at 135, has been replaced by the Federal Rules of Civil Procedure. State courts will often be required to apply federal law on preclusion questions to vindicate for the requirements of the Rules. *See, e.g.*, 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1417 (1971)(Rule 13(a) bars a state claim that should have been asserted as a compulsory counterclaim in a prior federal action). At least as to such questions, federal law must also control where the second action is a federal diversity action. *See Kern v. Hettinger, supra*. It has been suggested that there is no reason to apply federal law on some preclusion questions and state law on others and that federal law always determines the preclusive effect of a federal diversity judgment in a subsequent diversity action. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); *accord Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499 (11th Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 966, 83 L.Ed.2d 970 (1985); *Harrison v. Celotex Corp.*, 583 F.Supp. 1497 (E.D.Tenn.1984); *Fraley v. American Cyanamid Co.*, 570 F.Supp. 497 (D.Colo.1983); *J. Aron & Co. v. Service Transportation Co.*, 515 F.Supp. 428 (D.Md.1981).

Second, the Supreme Court has required the federal courts to give state judgments such collateral estoppel, *see Allen v. McCurry*, 449 U.S. 90, 101 S.Ct 411, 66 L.Ed.2d 308 (1980), and *res judicata*, *see Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), effect as would the courts of the rendering state. This rule applies even where the state judgment adjudicates federal questions. *See St. John v. Wisconsin Employment Relations Board*, 340 U.S. 411, 71 S.Ct. 375, 95 L.Ed. 386 (1951); *Rollins v. Dwyer*, 666 F.2d 141 (5th Cir.1982). Thus, a state court's power to declare the victor in a particular controversy includes the power to define the scope of the victory. It would seem that federal courts must possess

(Footnote continued)

is a criminal conviction. Federal courts might appear to lack a strong interest in fashioning law that determines the collateral use of federal convictions in civil cases arising under state law. However, in *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court held that, in a federal civil rights action, a state criminal conviction must receive the same collateral estoppel effect it would receive in the courts of the rendering state. The Court reached this result despite the strong federal interest in providing a federal forum for civil rights plaintiffs. It would be anomalous if federal law did not similarly determine the preclusive effect of a federal criminal judgment in a subsequent state court action or in a subsequent diversity action. *See Wehling v. Columbia Broadcasting System*, 721 F.2d 506 (5th Cir.1983),*

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an equivalent power and that federal law should determine the preclusive effect of a federal judgment, without regard to the basis of jurisdiction. *See Restatement (Second) of Judgments* § 87 (1982); Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976).

However, since the instant controversy involves the preclusive effect of a prior federal question judgment, we need not decide the choice of law issue relative to a federal diversity judgment.

* The Ninth Circuit has held that state law determines the preclusive effect of a federal criminal conviction in a subsequent diversity action. *See St. Paul Fire & Marine Insurance Co. v. Weiner*, 606 F.2d 864 (9th Cir.1979). This result appears merely to be an application of that Circuit's rule that, in a diversity action, state law determines the preclusive effect of all federal judgments, including federal question judgments. *See Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982). For the reasons given in the text, this general rule seems erroneous.

The Seventh Circuit has also looked to state law to determine the collateral estoppel effect of a federal conviction upon a diversity suit. *Nathan v. Tenna Corp.*, 560 F.2d 761, 763 (7th Cir.1977). *Nathan* relied on Fifth Circuit law, *Breeland v. Security Insurance Co.*, 421 F.2d 918 (5th Cir.1969), which the Fifth Circuit no longer follows. *See Wehling v. Columbia Broadcasting System*, *supra*. *Nathan* appears to have approached the problem as an application of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct.

(Footnote continued)

Because *Frank* did not consider, and did not need to consider, what law a state court would apply to determine the preclusive effect of a federal criminal conviction, we do not feel obliged to adopt its suggestion that a diversity court should apply state law to such an issue. We also note that the implicit assumption in *Frank* that a state court would apply state preclusion law has been eroded by the Supreme Court's decision in *Allen v. McCurry, supra*. For the reasons given above, we hold that federal law governs the collateral estoppel effect of a federal criminal conviction in a subsequent diversity action. It is especially appropriate to apply federal law in the pending case since the estoppel issue turns on analysis of the unusual circumstances of the disposition of the prior federal appeal, a matter affecting "important procedural interests" of a federal court. *See* 18 C. Wright, *supra*, § 4472 at 741. We therefore proceed to apply federal preclusion law to the instant controversy.

[2] 2. *Gelb's Claims.* The Government bears a higher burden of proof in the criminal than in the civil context and consequently may rely on the collateral estoppel effect of a criminal conviction in a subsequent civil case. *See United States v. Podell*, 572 F.2d 31, 35 (2d Cir.1978). Because mutuality of estoppel is no longer an absolute requirement under federal law, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), a party other than the Government may assert collateral estoppel based on a criminal conviction. *See United States v. Frank, supra*, 494 F.2d at 160. The criminal defendant is barred from relitigating any issue determined adversely to him in the

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1020, 85 L.Ed. 1477 (1941), looking to state law to determine whether the state would choose the collateral estoppel law of the jurisdiction that rendered the judgment of conviction or its own collateral estoppel law. In *Nathan* that *Klaxon* inquiry directed the diversity court back to federal law as the law Illinois would have "chosen." *See also Constantini v. Trans World Airlines, supra*. Since we believe that a state must apply federal law in determining the collateral estoppel effect of a federal criminal judgment, we think the *Klaxon* inquiry need not be undertaken. That approach makes sense only where a state is free to apply its own law in choosing which of alterantive bodies of law it will apply to a particular issue.

criminal proceeding, provided that he had a full and fair opportunity to litigate the issue, *see Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 1897, 72 L.Ed.2d 262 (1982); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, *supra*, 402 U.S. at 328-29, 91 S.Ct. at 1442-43.

Applying the foregoing principles to the instant controversy, we note that five counts of the criminal indictment charged Gelb with committing mail fraud by inflating the amount of his losses in statements to Royal. The jury returned convictions on these counts, and this Court reviewed and affirmed the convictions. Since no exceptions to the collateral estoppel rule apply, those convictions establish in this proceeding that Gelb misrepresented his losses to Royal. Under New York law,[5] submission of fraudulent proof of loss statements releases an insurer from its obligations under a fire insurance policy. *See* N.Y.Ins.Law § 3404 (McKinney 1985); *Saks & Co. v. Continental Insurance Co.*, 23 N.Y.2d 161 242 N.E.2d 833, 295 N.Y.S.2d 668 (1968). Therefore, Royal was entitled to judgment as a matter of law under Fed.R. Civ.P. 56, and the District Court properly dimissed Gelb's claim.

[3] 3. *Royal's Counterclaim.* Determining the collateral estoppel effect of Gelb's criminal conviction with respect to Royal's counterclaim is more complex. Three of the counts in the criminal indictment alleged that Gelb committed mail fraud by submitting statements to Royal in which he falsely denied that he had caused the Franklin Place fire. The jury found Gelb guilty on these counts, and the District Court's judgment of conviction was based on the verdicts on these counts. A finding that Gelb had in fact caused the Franklin Place fire was essential to support these verdicts. However, in reviewing the judgment, this Court found it unnecessary to determine, and explicitly declined to determine, whether the evidence supported a finding that Gelb had caused the Franklin Place fire, even though our decision stated that convictions on all the mail fraud counts

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[5] The parties agree, and we assume, that New York law governs the substantive state law claims advanced by both parties.

were affirmed. We must therefore determine the collateral estoppel effect of an adverse District Court finding that was explicitly not reviewed but was necessary to a conviction that was said to have been affirmed.

The doctrine of collateral estoppel represents a choice between the competing values of correctness, uniformity, and repose. Reexamination of an issue may well demonstrate that its previous resolution was incorrect, as a result of such factors as better evidence, better advocacy, or better decision-making. There is no general rule of life that an issue once determined may never be reexamined, although such reexamination will not necessarily yield a better result. In any event, judicial efficiency demands that there be an end to litigation at some point. Our system resolves the conflict among values by holding that an issue determined in one proceeding normally may not be reexamined.

This resolution elevates uniformity and repose above correctness. In recognition of this consequence the doctrine of collateral estoppel has limitations to assure that the precluded issue was carefully considered in the first proceeding. For the bar to apply: (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. *See generally* 18 C. Wright, *supra*, § 4416.

Appellate review plays a central role in assuring the accuracy of decisions. Thus, although failure to appeal does not prevent preclusion, *see New Haven Inclusion Cases*, 399 U.S. 392, 481, 90 S.Ct. 2054, 2104, 26 L.Ed.2d 691 (1970); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950); *Angel v. Bullington*, 330 U.S. 183, 189, 67 S.Ct. 657, 660-61, 91 L.Ed.2d 232 (1947), inability to obtain appellate review, or the lack of such review once an appeal is taken, does prevent preclusion. The limitation that a preclusive finding must be necessary to support a judgment is explained at least in part by the difficulty of obtaining appellate review of "unnecessary"

findings. For example, a winning party may not appeal issues determined adversely to it by the trial court and, as a consequence, is not barred from relitigating such issues. *See United States v. Cheung Kin Ping*, 555 F.2d 1069, 1076 (2d Cir.1977).

In another context, there has been much controversy over whether alternative, independently sufficient grounds are "necessary" to a judgment so that collateral estoppel may be applied. *See* 18 C. Wright, *supra*, § 4421. The general rule in this Circuit is that "if a court decides a case on two grounds, each is a good estoppel." *Irving National Bank v. Law*, 10 F.2d 721, 724 (2d Cir.1926) (L. Hand, J.); *see Ezagui v. Dow Chemical Corp.*, 598 F.2d 727, 732-33 (2d Cir.1979); *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir.1978); *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.), *cert. dismissed*, 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 323 (1977). The possibility that a losing litigant might not seek appellate review on one of the grounds because the other is clearly decided correctly is thought insufficient to allow relitigation. However, if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground. *See Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir.1981); *Stebbins v. Keystone Insurance Co.*, 481 F.2d 501, 507 n. 13 (D.C.Cir.1973); *Martin v. Henley*, 452 F.2d 295, 300 (9th Cir.1971); *International Refugee Organization v. Republic S.S. Corp.*, 189 F.2d 858, 862 (4th Cir.1951); *Moran Towing & Transportation Co. v. Navigazione Libera Triestina, S.A.*, 92 F.2d 37, 40 (2d Cir.), *cert. denied*, 302 U.S. 744, 58 S.Ct. 145, 82 L.Ed.2d 855 (1937).[6]

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[6] Under the special circumstances of *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir.1970), to which that case has been limited by our subsequent decisions, *see Winters v. Lavine*, *supra*, 574 F.2d at 67; *Williams v. Ward*, *supra*, 566 F.2d at 1154, we created an exception to the general rule of *Irving National Bank v. Law*, *supra*, and held that alternative, independently sufficient grounds were not preclusive. The *Restatement* has adopted this approach as a general rule. *See Restatement (Second) of Judgments* § 27 comment i (1982). Under this view, the disincentive to seeking appellate review is sufficient to prevent preclusion. However, just as unreviewed findings are not preclusive under our general rule once an appeal is taken, an alternative finding that is in fact reviewed and affirmed is preclusive under the *Restatement*. *See id.* § 27 comment o.

Since Gelb did not receive effective appellate review of whether he caused the Franklin Place fire, collateral estoppel does not apply to bar relitigation of this issue. Therefore, the District Court's granting of Royal's motion for summary judgment on its counterclaim is reversed, and the case is remanded for a trial on this counterclaim.

Conclusion

The judgment of the District Court is affirmed in part, reversed in part, and remanded, for proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE WILFRED FEINBERG,
HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.

JOSEPH GELB,

Plaintiff-Appellant,

v. 85-7667

ROYAL GLOBE INSURANCE COMPANY,

Defendant-Appellee.

ORDER

Upon consideration of Gelb's motion of April 5, 1991, in this civil case, seeking reinstatement of his appeal and other relief, it is hereby ORDERED that the motion is denied without prejudice to whatever relief, if any, Gelb may be entitled to in connection with his criminal case.

/s/Wilfred Feinberg (on J.O.N.)

/s/Jon O. Newman

/s/Ralph K. Winter (on J.O.N.)
Circuit Judges.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit.

Docket Number: 82-1026

UNITED STATES OF AMERICA

Appelle-Respondent

v

JOSEPH GELB

Appellant-Petitioner

NOTICE OF MOTION

state type of motion

for Reconsideration and Reinstatement of Appeal

Use short title

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Joseph Gelb, Pro Se
Box 436
Woodmere, N.Y. 11598
516-295-1323

Has consent of opposing counsel:

A. been sought? No

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? Yes

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b)) May 15, 1991

Has argument date of appeal been set:

A. by scheduling order? No

B. by firm date of argument notice? No

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Andrew Maloney,
U.S. Attorney, Eastern District
225 Cadman Plaza, East,
Brooklyn, N.Y. 11201
718-330-7000

Brief statement of the relief requested: Reversal of Counts 2,3,& 4 "Use of the mails to submit under oath a statement that Gelb did not cause the fire"

Reversal of Counts 6,7,8,9, & 10 "Use of mails to submit an inflated insurance claim" Such other relief deemed appropriate (refer to 85-7667)

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/Joseph Gelb
Signed name must be printed beneath

Joseph Gelb Pro Se

Appearing for: *(Name of party)*

Defendant

Date: April 1991

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied

Date: April 10, 1991

/s/ James L. Oakes

/s/ Thomas J. Meskill J.W.

/s/ E. Van Graafeiland J.V.O.
Circuit Judge

APPENDIX D

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit.

Docket Numbers: 82-7026, 85-7667

UNITED STATES OF AMERICA Appellee-Respondent v JOSEPH GELB Appellant-Petitioner	NOTICE OF MOTION *state type of motion* **for Motion for a Hearaing En Banc for Reconsideration and Reinstatement of Appeal**

Use short title
JOSEPH GELB v ROYAL GLOBE INSURANCE CO.

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Joseph Gelb, Pro Se
Box 436
Woodmere, NY 11598
516-295-1323

Has consent of opposing counsel:

A. been sought? No

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? No

B. by firm date of argument notice? No

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Andrew Maloney
US Attorney, ED
225 Cadman Plaza E.
Brooklyn, NY 11201
212-220-1000

James Taylor
Bigham Englar Jones & Juston
14 Wall Street
New York, NY 10005-2140
212 732-4646

Brief statement of the relief requested: Rehearing En Banc of Motion for Reconsideration and Reinstatement of Appeal because of failure of this Court to grant effective Appellate Review which would have focused on feabrication of evidence and documents, perjury of five key government witnesses and withholding of exculpatory evidence. Such a Hearing would provide Constitutional Right of Due Process of law, and reveal a colorable showing of factual innocence which should result in reversal of jury verdict.

By: *(Signature of attorney)*

/s/Joseph Gelb
Signed name must be printed beneath

Joseph Gelb Pro Se

Appearing for: *(Name of party)*

Defendant

Date: May 29, 1991

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied

FOR THE COURT,

/s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH, Clerk

Date: 7/24/91

APPENDIX E

AMENDMENT V [1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

OPPOS

BR

SITION

IEF

(2)

No. 91-665

Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH GELB,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

JOSEPH GELB,

Petitioner,

—against—

ROYAL GLOBE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN M. MARCUSA
Counsel for Respondent
14 Wall Street
New York, New York 10005-2140
(212) 732-4646

BIGHAM ENGLAR JONES
& HOUSTON
Attorneys for Respondent

Of Counsel:
James J. Taylor

Counterstatement of Questions Presented

1. Should this Court grant writs of certiorari in two separate cases, one criminal and the other civil, where both cases have previously been the subject of denials of certiorari?

2. Can petitioner be heard to seek certiorari on the basis of denial of due process because the Court of Appeals refused to grant motions for reconsideration and reinstatement of his appeals made years after denial of certiorari in the criminal and civil cases?

3. Should this Court grant writs of certiorari to review decisions which (a) are not in conflict with any other federal or state court, (b) do not depart from the usual course of judicial proceedings, and (c) do not involve an important question of federal law?

4. Should this Court grant writs of certiorari to review an issue which is moot, *i.e.*, whether or not the petitioner set the fire for which he submitted an insurance claim?

Statement Pursuant to Rule 29.1

Respondent, Royal Globe Insurance Company, was renamed Royal Insurance Company of America on June 27, 1980. Royal Insurance Company of America is a subsidiary of Royal Group, Inc., which in turn is wholly owned by Royal Insurance plc,[1] a United Kingdom entity which in turn is wholly owned by Royal Insurance Holdings plc, a United Kingdom entity. Affiliated companies are:

American and Foreign Insurance Company
B.E.I. Services, Inc.
Charlotte Lloyd's, Inc.
Crown & Shield, Inc.
Globe Indemnity Company
Keller Insurance Brokers, Inc.
Lloyd's, Inc.
Maccabees Equity Sales Company
Milbank Insurance Company
Newark Insurance Company
Pension Portfolio Advisors, Inc.
Personal Financial Assistant, Inc.
Protected Settlements, Inc.
RC Holdings, Inc.
Risk Innovations Service and Consulting, Inc.
Royal Associates, Inc.
Royal Excess and Special Risks, Inc.
Royal Excess and Special Risks Insurance Services, Inc.
Royal Excess and Special Risks of Georgia, Inc.
Royal Excess and Special Risks of Illinois, Inc.
Royal Excess and Special Risks of Texas, Inc.
Royal Financial Services, Inc.
Royal Group, Inc.
Royal Holdings, Inc.
Royal Indemnity Company
Royal Institutional Investment Advisors Group, Inc.
Royal Insurance Company of America

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1 Public Limited Company

Royal Investment Management Company
Royal Life and Annuity Company
Royal Life Insurance Company of America
Royal Life Insurance Company of New York
Royal Lloyd's of Texas
Royal Maccabees Life Insurance Company
Royal Special Risks Insurance Company
Royal Specialty Underwriting, Inc.
Royal Surplus Lines Insurance Company
Safeguard Insurance Company
Shield Management, Inc.
The Royal Insurance Foundation, Inc.
U.S. Transportation Underwriters, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

The petition before the Court has as its objective the granting of certiorari as to two decisions, one criminal and the other civil, by the Court of Appeals for the Second Circuit. In both cases, there have been prior denials of certiorari. The citations for the denials of certiorari are:

United States v. Gelb
700 F.2d 875 (2d Cir. 1983), *cert. den.* 464 U.S. 853 (1983)

Joseph Gelb v. Royal Globe Insurance Company
798 F.2d 38 (2d Cir. 1987), motion to proceed *in forma pauperis* denied, 479 U.S. 1081 (1987), *cert. denied*, 480 U.S. 948 (1987)

The vehicle by which petitioner seeks to have this Court disregard its prior denials of certiorari is the denial by the Court of Appeals in April and May of 1991, of separate motions seeking reconsideration and reinstatement of both appeals. Both motions were denied in summary fashion (A-30 to 33, A-34 to 36).[2]

Respondent Royal Globe Insurance Company (hereinafter "Royal") is at a total loss to understand how petitioner can be heard to argue that he was denied due process when the issue of his conviction for mail fraud has been considered four times by the Court of Appeals for the Second Circuit (A-1 to 37), and has been the subject of two denials of certiorari by this Court.

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2 Figures in parentheses refer to pages in the petition and its five-part appendix and respondent Royal's addendum to this brief. Where there is merely an arabic number, the reference is to the petition. Where preceded by an "A," the reference is to the appendix to the petition. Where preceded by the letters "Add.," the reference is to the addendum to this brief.

Counterstatement of the Case

The petition herein has a five-part appendix attached. The parts are labeled A, B, C, D and E and consist of copies of decisions by the Court of Appeals. There is no appendix containing exhibits or references to specific portions of the trial transcript or minutes of the Rule 33 hearing. Petitioner's statement of the case is replete with allegations as to false testimony, coverups, tampering with evidence, and other unsupported assertions by Mr. Gelb allegedly spelling out his innocence with respect to the cause of the fire. All of those contentions by Gelb are irrelevant.

The decisions below, which are in petitioner's appendix, disclose the following as to the facts:

Petitioner owned and operated several businesses from a commercial building in Woodmere, New York (A-2). During the evening of April 26, 1980, the premises were destroyed by fire (A-2). Subsequent investigation by the Fire Marshal's office revealed that the fire was intentionally set by use of uncontained gasoline (A-2). Thereafter, petitioner was indicted and charged with one count of maliciously damaging and destroying a business premises by means of an "explosive," 18 U.S.C. § 844(i) (1976); one count of using an explosive to commit a felony, 18 U.S.C. § 844(h) (1976); and eight counts of using the mails to defraud an insurance company, §§ 1341, 1342 (1976) (A-2 to 3).

At trial, the government's case was based principally on the testimony of four expert witnesses who corroborated the prosecution's theory that the fire was intentionally set by means of an accelerant (A-3). It also came out that petitioner had more than doubled his insurance coverage three weeks before the blaze, and that immediately after the fire he had offered to sell his business for one dollar if the prospective buyer would assume his outstanding business debts (A-3). The government also showed that petitioner entered the premises shortly before the fire and was observed leaving the building five minutes before it was reported (A-3). Further,

the evidence disclosed that petitioner inflated his insurance claim and fabricated items of loss (A-3). Gelb's assertions to the contrary (12), the inflation of the claim went far beyond mere puffing for negotiation purposes. For example, Gelb's office manager testified that the business purchased less than $20,000 of office supplies in one year and that the year-end office supply inventory was $31,526 (Add. 8). Inventory sheets submitted to the insurer claimed an office supply inventory loss of approximately $207,000 (Add. 8). The office manager also testified that there were at most three electric pencil sharpeners on the premises and no paper shredders (Add. 8). The inventory made claim for thirty-five electric pencil sharpeners and six paper shredders (Add. 8). Another employee estimated the value of the library at $10,000 (Add. 8). Gelb was unhappy with that figure and sent the employee to inventory a larger library of a Valley Stream, New York accounting firm. It was this larger inventory of $58,879 that appeared on the claim form (Add. 8).

Based on the foregoing facts, the jury convicted Gelb on ten counts (A-2). Two counts involved the use of an explosive, *i.e.*, gasoline (A-2). Three of the mail fraud counts were based on Gelb's representations in sworn proofs of loss that he had not caused the fire (A-18 to 19). The remaining five counts of mail fraud were based on the inflated claims made by Gelb (A-19). Thereafter, Gelb moved, pursuant to Federal R.Crim.P. 33, for a new trial claiming that newly discovered evidence established his lack of participation in the cause of the fire (A-19). One of the cornerstones of the Rule 33 motion was that after the trial, Gelb located a chemist who ran tests which he claimed showed that debris samples had been contaminated with gasoline after the fire (5, A-10 to 11).[3]

The Decisions Below

Since petitioner seeks a rehearing of his prior petition in the criminal case as well as review of the instant civil litiga-

---

3 The ease with which one can create an issue by resort to a scientific expert is a fact of life well known to litigators and trial judges.

tion, separate discussions of the decisions in each will be of aid to the Court.

In *United States v. Gelb*, 700 F.2d 875, 877 (2d Cir. 1983), both sides conceded for the purpose of the appeal that the fire was caused by the use of uncontained gasoline (A-5). The Court of Appeals reversed Gelb's conviction on the use of explosives counts, holding at pages 878-879 that 18 U.S.C. § 844(h) and (i) were not intended to encompass gasoline as an instrument for the crime of arson (A-4 to 8). Gelb's conviction on the remaining eight counts of the indictment was affirmed (A-9 to 11), and this Court denied certiorari. 464 U.S. 853 (1983).

The second decision sought to be reviewed is *Gelb v. Royal Globe Insurance Company*, 798 F.2d 38 (1987). The suit was filed before Gelb's indictment and held in abeyance between the time of conviction and the decision in *United States v. Gelb*, *supra*. In November, 1984, after Gelb had served his sentence on the mail fraud counts, respondent Royal moved for summary judgment dismissing the action and for judgment over on its counterclaim. The motion was granted in its entirety by the United States District Court for the Eastern District of New York. Gelb appealed, and the Court of Appeals affirmed the dismissal of Gelb's suit against Royal, saying that his mail fraud conviction estopped him from claiming under its policy but did not mandate judgment for Royal on its counterclaim since it was based on Gelb's having set the fire, an aspect of the case not reviewed by the Second Circuit because of the then wording of 18 U.S.C. § 844(h) and (i) (A-17 to 29).

POINT I

THE PETITION SHOULD BE DENIED AS IT FAILS TO EVEN SUGGEST THE POSSIBILITY OF ERROR BY THE COURT OF APPEALS.

The entire thrust of the petition is an effort to obtain a reversal of all of Gelb's fraud convictions because the Court of Appeals did not explicitly pass on whether or not he set the fire. Petitioner raises no real issue as to the submission of a grossly inflated claim which included items not even on the premises (Add. 8). He attempts to justify his action by stating that the claim was calculated to provide a negotiating basis to collect the full amount of Royal's coverage, *i.e.*, $500,000 (12-13).

There is a statutorily mandated fire insurance policy in the State of New York, N.Y. Ins. Law § 3404 (McKinney 1985). The first six lines of that policy render it void if an insured conceals or misrepresents any material fact or circumstance concerning the insurance. This has given rise to a well-established principle of law that under such policies, false swearing and the assertion of inflated claims preclude recovery on the policy. *Saks & Co. v. Continental Ins. Co.*, 23 N.Y.2d 161, 165, 242 N.E.2d 833, 835 (1968); *Werber Leather Coat Co. v. Niagara Fire Ins. Co.*, 254 App.Div 298, 300, 5 N.Y.S.2d 1, 3 (2d Dept. 1938); *Sunbright Fashions, Inc. v. Greater N.Y. Mut. Ins, Co.*, 34 A.D.2d 235, 237, 310 N.Y.S.2d 760, 762 (1st Dept. 1970), *affd.*, 28 N.Y.2d 563, 268 N.E.2d 323 (1970); *Domagalski v. Springfield F. & M. Ins. Co.*, 218 App.Div. 187, 189-190, 218 N.Y.S. 164, 166 (4th Dept. 1926). The language of the decisions is particularly pertinent to a situation such as the one at bar where the insured included in his proof of loss items not on the fire premises. The decisions make it clear that even though the insurer is not prejudiced, the fraud vitiates the policy. An excellent discussion of the rationale behind the rule may be found in *Martin Fine,-et al. v. Bellefonte Underwriters Insurance Co.*, 725 F.2d 179 (2d Cir. 1984), *cert.den.*, 469 U.S. 874 (1984).

POINT II

THE PETITION IS IN REALITY ONE FOR A REHEARING OF AN ORDER DENYING A PRIOR PETITION FOR A WRIT OF CERTIORARI—IT DOES NOT COMPLY WITH AT LEAST THE SPIRIT OF RULE 44.

The propriety of Gelb's conviction on the grounds of insurance fraud was, as previously noted, the subject of a petition for certiorari in the criminal case. The petition was denied (464 U.S. 853 (1983)). The dismissal of Gelb's claim under Royal's insurance policy on the basis of collateral estoppel arising from the fraud conviction was also the subject of a petition for certiorari in the civil case. That petition for certiorari was denied (480 U.S. 948 (1987). The record is replete with statements to the effect that Royal deprived Gelb of due process when it discontinued its counterclaim grounded on his setting the fire. That same issue was extant when Gelb previously petitioned this Court for certiorari in the civil case. In practical effect, the instant petition is one for a rehearing of two prior orders denying two prior petitions for a writ of certiorari. Rule 44 of the Supreme Court Rules specifically provides that a petition for a rehearing of a denial of a writ of certiorari must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. Counsel or the party must certify that the petition is restricted to such grounds. None of the grounds has been certified to by Gelb. In point of fact, there are none. The only change in circumstances is that Gelb is in danger of having his C.P.A. license revoked and faces total disbarment (6). Even if the question of his having set the fire were relitigated, despite its being moot, that would not affect the situation that Gelb now finds himself in. His petition states that his predicament is based on the convictions and the failure of the Second Circuit to reverse the mail fraud counts. Endeavors to reverse the mail fraud counts have been the subject of two denials of certiorari by this Court. What Gelb now seeks to do is nothing

other than an endeavor to obtain a rehearing of both of those denials. This is at least a violation of the spirit of Rule 44.

POINT III

THERE CAN BE NO VALID BASIS FOR A CONTENTION BY PETITIONER THAT HE WAS DENIED DUE PROCESS.

Petitioner claims that he is entitled to review by this Court because he was denied due process of law and that as a result, the ends of justice are not met (16). The Court of Appeals strained to ensure that he had every opportunity to litigate the issue of his having set the fire insofar as it was relevant. Under New York law, collateral estoppel determines an issue even where it is used offensively. *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969). Here, the Court of Appeals took pains to apply a more restrictive federal standard (A-20 to 25). The landmark federal case as to collateral estoppel is *Parklane Hosiery v. Shore*, 439 U.S. 322, 329 (1978), which permits collateral estoppel to be used both offensively and defensively. However, in permitting the use of offensive collateral estoppel, this Court gave lower courts discretion as to when to apply it. 439 U.S. 322, at p. 331. In analyzing its prior opinion, the Court of Appeals determined that it had not fully reviewed the evidence as to whether Gelb caused the fire because it was unnecessary with respect to five of the of mail fraud counts (A-26 to 27). It then chose not to use offensive collateral estoppel to award respondent summary judgment on its counterclaim (A-28 to 29). In so doing, it followed a group of cases holding that if the lower court's result is based on two grounds (here, arson and fraud) and the appellate court affirms on only one ground (fraud), the lack of appellate review is a basis for not applying offensive collateral estoppel (A-28 to 29).

Gelb claims that he was denied due process because Royal dropped its subrogation claim against him. To have pursued the claim would have been economic folly. Gelb concedes in the present petition that his net worth is zero (6). Presumably, the same was true when the civil case was appealed in 1987. He made a motion to proceed before this Court *in forma pauperis* that same year. 479 U.S. 1081 (1987). Gelb therefore argues that if one chooses not to proceed to trial against an insolvent, that constitutes denial of due process to the insolvent.

POINT IV

THIS COURT DOES NOT ACT FOR THE BENEFIT OF PARTICULAR LITIGANTS.

Petitioner is a suspended lawyer (2) with demonstrated ability to raise every conceivable argument in support of his goal. That goal is to collect on an insurance claim which has been held to be fraudulent. There are no public policy considerations to be reviewed by this Court. The claim he asserts is for the benefit of a particular litigant, *i.e.*, Joseph Gelb. This Court does not sit for the benefit of a particular litigant. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). It grants a writ of certiorari only in cases involving principles the settlement of which is of importance to the public generally or where there is a conflict between Court of Appeals decisions. None of those considerations is extant here.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

STEPHEN M. MARCUSA
Counsel for Respondent,
Royal Globe Insurance Company

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Respondent
14 Wall Street
New York, New York 10005-2140
(212) 732-4646

Of Counsel:

James J. Taylor

Dated: November 15, 1991

ADDENDUM

ADDENDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-81-0557

(Costantino, J.)

JOSEPH GELB & COMPANY d/b/a JOSEPH GELB, SMALL BUSINESS ADVISORS, INC., JOEL MANAGEMENT CORP., WHITEHILL SYSTEMS, INC., WHITEHILL BROKERS CO. and WHITEHILL COMPUTORS SYSTEMS, INC.,

Plaintiffs,

—against—

ROYAL GLOBE INSURANCE COMPANY,

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
: SS: -
COUNTY OF NEW YORK)

JAMES J. TAYLOR, being duly sworn, deposes and says that:

1. Deponent is an attorney-at-law and a member of the firm of Bigham Englar Jones & Houston, the attorneys for the defendant, ROYAL GLOBE INSURANCE COMPANY, and admitted to practice before this Honorable Court. He has handled this action since its inception and also represented the defendant when the subject matter of the lawsuit was in the claim stage. Deponent is therefore fully familiar with all the proceedings in the lawsuit itself, the facts under-

lying the action, and that which occurred prior to its commencement.

2. This affidavit is submitted in support of a motion by defendant to dismiss plaintiffs' complaint based on the fact that JOSEPH GELB, the alter ego of plaintiffs, and the individual who executed the proofs of loss submitted in their behalf, was convicted on eight counts of insurance fraud arising from the claims involved in this lawsuit. Defendant also moves for summary judgment against plaintiffs on its counterclaim to recover $81,499.98 which it paid to its subrogor, BENJAMIN R. BURTIS, the owner of 10-12 Franklin Place, Woodmere, New York. As will be hereinafter demonstrated, JOSEPH GELB stands convicted of insurance fraud in that he caused and originated the fire that destroyed those premises.

3. The suit by plaintiffs is one wherein they seek to effect recovery on policies of fire insurance. Fraud or false swearing as a matter of law voids a fire insurance policy and precludes recovery on it. By reason of the conviction of JOSEPH GELB, the plaintiffs are estopped from disputing that the frauds were committed, and summary judgment must be rendered dismissing the complaint and awarding defendant judgment on its counterclaim.

4. This action was commenced on March 4, 1981 by the service of a summons and complaint on ROYAL INSURANCE COMPANY OF AMERICA (hereinafter "ROYAL"), which is the present corporate style of the entity which had formerly done business as ROYAL GLOBE INSURANCE COMPANY*.

5. A copy of the complaint is annexed hereto as Exhibit "A," and a copy of ROYAL's amended answer containing its counterclaim is annexed as Exhibit "B." Reference to Exhibit "B" will disclose that the second and third defenses on the part of ROYAL are to the effect that its policies

---

* The distinction in corporate styles will be ignored in succeeding paragraphs in that both are simply referred to as ROYAL.

became null and void from inception in that plaintiffs were guilty of fraud in that the insured premises was intentionally set on fire to collect insurance proceeds.

6. The fourth affirmative defense on the part of ROYAL is to the effect that JOSEPH GELB fraudulently testified at an examination under oath conducted pursuant to policy terms and conditions. The policies at issue are both fire insurance policies. Under the 165 lines which by law make up the standard fire insurance policy, an insured is required to submit itself to examination under oath. The policy language which establishes that obligation reads as follows:

> ". . . The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, ..." (Insurance Law, Sec. 168)

7. ROYAL's fifth defense is to the effect that the proofs of loss tendered after demand therefor contain statements consisting of misrepresentations of material facts and false swearing concerning the insurance and the amount of loss sustained so as to render the policies null and void. The policies of insurance contain provisions requiring the filing of sworn proofs of loss within sixty days. In New York, under Section 172 of the Insurance Law, the requirement for the filing of the proofs of loss is waived absent a formal demand for same by the insurer. In this instance, formal demands were served in letter authored by deponent on December 4, 1980 and transmitted to plaintiffs' counsel. Two of the plaintiffs filed proofs of loss on December 9, 1980. Copies of the correspondence relating to the proofs of loss and copies of the proofs themselves are annexed as Exhibit "C." As shown in Exhibit "C," the entities filing the proofs of loss are JOSEPH GELB & COMPANY and SMALL BUSINESS ADVISORS, INC. As is disclosed in Exhibit "C," both proofs of loss were signed by JOSEPH GELB.

8. On October 24, 1980, JOSEPH GELB as a partner in JOSEPH GELB & COMPANY and as an officer and stockholder of SMALL BUSINESS ADVISORS, INC., was indicted on ten counts of arson and fraud. A copy of the indictment is annexed as Exhibit "D."

9. JOSEPH GELB was tried before Judge Jacob Mishler and a jury in Uniondale and was convicted on all counts of the indictment on November 5, 1981.

10. Following his conviction, Mr. Gelb appealed to the Court of Appeals for the Second Circuit, which court rendered its opinion on February 15, 1983 in a decision reported in *United States v. Gelb*, 700 F.2d 875 (2d Cir. 1983). For the convenience of the Court, a copy of the decision is annexed as Exhibit "E." As noted by the Court of Appeals, ". . . the facts presented at trial revealed a classic case of arson, ..." As summarized by the court, the facts disclosed on trial were the following:

> "BACKGROUND
>
> "Appellant Joseph Gelb owned and operated several businesses from a commercial building located at 10-12 Franklin Place in Woodmere, New York. During the evening of April 26, 1980, the Franklin Place premises were destroyed by fire. Subsequent investigations by the Nassau County Fire Marshall's office revealed that the fire was intentionally set by use of uncontained gasoline.
>
> "Appellant Gelb was indicted and charged with one count of maliciously damaging and destroying a business premises by means of an 'explosive,' 18 U.S.C. § 844(i) (1976); one count of using an 'explosive' to commit a felony, 18 U.S.C. § 844(h) (1976); and eight counts of using the mails to defraud an insurance company, 18 U.S.C. §§ 1341, 1342 (1976). At trial, the government's case was based principally on the testimony of four expert witnesses who substantially corroborated the prosecution's theory that the Franklin Place fire was intentionally set by means of an accelerant. Two of

these experts, Thomas Russo and Michael DiMarco, testified that they removed three debris samples from the fire scene shortly after the blaze, and based upon subsequent gas chromotograph testing, they detected the presence of gasoline in two of these samples. Mr. Robert Doran, a supervising fire investigator for Nassau County, testified that he examined the scene later that night, and in his expert opinion, the fire was caused by the ignition of a volatile liquid.

"Additional circumstantial evidence revealed that Gelb had more than doubled his insurance coverage approximately three weeks before the blaze and that immediately after the fire had offered to sell his business for one dollar if the prospective buyer would assume his outstanding business debts. The government also showed that Gelb entered the premises shortly before the fire and that he was observed leaving the building approximately five minutes before the blaze was reported. Finally, the evidence disclosed that the appellant grossly inflated his fire loss and fabricated some losses when submitting his insurance claim."

11. The Court of Appeals was constrained to dismiss two counts of the indictment which were based on 18 USCA § 844, which is part of the Explosive Control Act. The holding was that since the gasoline with which Gelb set the fire was not in a container, the Explosive Control Act did not apply. Insofar as the present motion is concerned, the Court of Appeals decided only that:

> "The convictions obtained under the Explosive Control Act, specifically counts one and five in the indictment, are hereby reversed." (700 F.2d at p. 879)

Left undisturbed was the jury's conviction of Gelb on eight counts of mail fraud involved in the scheme to defraud ROYAL.

12. Insofar as the matter at bar is concerned, there was a specific finding by the jury that Gelb caused and originated

the fire giving rise to the claim in this civil action which was not disturbed on appeal. Count Four of the indictment (Exhibit "D") reads in pertinent part as follows:

> "4. It was a further part of the scheme and artifice to defraud that the defendant JOSEPH GELB would submit and cause to be submitted to Royal Globe Statements In Proof of Loss on behalf of Joseph Gelb & Co. and Small Business Advisors, Inc. which contained a representation that the loss of the contents damaged during a fire at 10-12 Franklin Place, Woodmere, New York, on April 26, 1980, 'did not originate by any act, design or procurement on the part of the insured', whereas in truth and in fact, the defendant JOSEPH GELB well knew that he had caused, originated and procured the cause and origin of the aforesaid loss at 10-12 Franklin Place, Woodmere, New York."

The language "did not originate by any act, design or procurement on the part of the insured" is taken directly from the proofs of loss which are part of Exhibit "C" on this motion.

13. Submitted with this affidavit and deemed marked as Exhibit "F" to it are pages extracted from the voluminous transcript in the criminal action. That portion of Judge Mishler's charge covering Count Four may be found at F2698 to F2708. It leaves little doubt that part of the fraud for which Gelb was convicted consisted of mailing proofs of loss (Exhibit "C") wherein he stated he had nothing to do with setting the fire (Exhibit "F" 2704).

14. Deponent would be less than candid if he did not note that the arson aspect is overkill, utilized because it supports that portion of ROYAL's motion as seeks summary judgment on ROYAL's counterclaim for what it had to pay the owner of the building which Gelb set on fire. As stated by the Court of Appeals:

"The mail fraud convictions were sustained by evidence wholly independent from those facts proving the arson." (700 F.2d at p. 879)

15. Counts Six through Ten of the mail fraud charges of which Gelb was convicted are separate and distinct from Two through Four, which in part at least involved his setting the fire, a point carefully noted by Judge Mishler in his charge to the jury:

"We come now to the mail fraud charge in counts six through ten. The scheme or artifice charged here is a separate and distinct scheme than that charged in counts two through four. This relates to the charge of submitting false and fraudulent inventories of supplies, furniture, equipment and other personal property Joseph Gelb claimed was lost in the fire."

16. Having been found guilty of Counts Six through Ten, Gelb has therefore been convicted of submitting false and fraudulent inventories of supplies, furniture, equipment and other personal property said to have been lost in the fire. In an accompanying memorandum of law, it will be demonstrated that the submission of a fraudulently over-valued claim voids an insurance policy.

17. A flavor of the frauds that were involved may be gleaned from those portions of the trial transcript which make up Exhibit "F" on this motion:

A few days before the fire, Gelb retained Sapperstein, Hochberg and Haberman, Inc., public insurance adjusters, to determine the amount of his claim for a total loss (1127-28). Milton Fratkin, a principal of this firm, received various documents concerning the claim from Mr. Gelb by mail (1134), and delegated the preparation of the detailed inventory sheets (Gov. Exhibits 9-A, 9-B, and 9-C, which became a part of the claim, to his employee, Julius Sholonsky (1142). Although Mr. Fratkin requested back-up documents to substantiate the

items listed, Mr. Gelb only turned over twelve bills to the adjuster (1143).

Gary Bowden, a staff accountant and office manager for Joseph Gelb (1165) testified that the total amount of office supplies purchased in one year was less than $20,000 (1175) and the year end office supply inventory of the business was $31,526 (1181), the inventory sheets submitted to the insurance companies claimed an office supply inventory loss of approximately $207,000 (Gov. Exhibits 9-A, 9-B, 9-C). Bowden further testified that at most there were three electric pencil sharpeners in the premises and no paper shredders (1173), yet the inventory submitted claimed 35 electric pencil sharpeners and six paper shredders.

Carl Cerruti, another employee, estimated that the value of the library was $10,000 (1308-1309). Apparently Mr. Gelb was unhappy with this figure, for he sent Cerruti to inventory a larger library at a Valley Stream accounting firm (1310). It was this larger inventory of $58,879 that appeared on the claim form (1310-1312 and Gov. Exhibits 9-A, 9-B, 9-C).

18. Deponent would be remiss in his obligations to the Court if he did not note the procedural status of the matter. Gelb's conviction was reported to the Court during a status conference on November 10, 1981, and the civil cause was marked discontinued without prejudice to reopen if the conviction were overturned on appeal. The docket sheet memorializing the conference and Court order are annexed as Exhibit "G."

19. As noted above, Gelb's conviction on eight counts was affirmed by the Court of Appeals. Thereafter, the Supreme Court of the United States denied certiorari on October 3, 1983. *See Gelb v. United States*, ____ U.S. ____, 104 Sup.Ct. Rep. 167 (1983). Therefore, since the conviction has not been overturned, this case is discontinued. Only the

counter-claim survives by reason of the Court's Order on Consent dated January 31, 1983.

WHEREFORE, defendant respectfully prays that an order be made herein directing summary judgment dismissing plaintiffs' complaint, with costs and disbursements, and further directing that defendant have judgment against plaintiffs on its counter-claim in an amount to be determined on a trial on the sole issue of damages before the Court or a Magistrate, with costs and disbursements on the counterclaim, and such other and further relief as to the Court may seem just and proper.

/s/ JAMES J. TAYLOR
James J. Taylor

Sworn to before me this
7th day of November, 1984.

/s/ JOANNE VENINO
Notary Public

[SEAL]